FUNDAMENTAL RIGHTS AS HUMAN RIGHTS

A Collection of Lectures

Justice Hosbet Suresh

The legally enforceable fundamental rights that the Indian Constitution guarantees to every citizen will remain empty words unless these rights are recognised as human rights. It is the human rights content that gives meaning to fundamental rights. But unfortunately, for most of the lawyers and judges, fundamental rights are no more than legal concepts.

Though the Supreme Court declared nearly three decades ago that the Right to Life under Article 21 includes the Right to Food, Clothing, Shelter and all that goes with human dignity, most lawyers and judges still consider them as inchoate, indeterminable legal jargon only to be used in classrooms and seminars.

In his lectures to post-graduate students on the subject which have been compiled in this book, the author looks at human rights not from a philosophical or religious perspective, but as those rights which every individual is entitled to by virtue of being a human being and which he/she must enjoy at all times and in all places.

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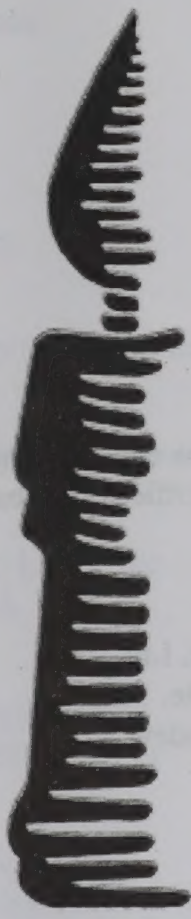

Justice Hosbet Suresh

Rs. 150/-

Published by Javed Anand
for Sabrang Communications and Publishing Pvt. Ltd.
P.O. Box 28253, Juhu Post Office, Mumbai - 400049.

and

Printed by Siddhi Offset Pvt. Ltd.
5-12, Kamat Industrial Estate, 396,
Veer Savarkar Marg, Prabhadevi,
Mumbai - 400025.

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PUBLISHER'S NOTE

This publication comes at a time when the common person's faith in the judiciary stands considerably shaken. Over half-a-century ago, the section on Fundamental Rights in the Constitution of India guaranteed to every citizen of the republic certain basic human rights that were legally enforceable – liberty, equality before law, and the right to a life with dignity. And the section on Directive Principles of State Policy spelt out how governments must deploy national resources to progressively ensure the full realization of these rights. But sadly, the judiciary which is the ultimate arbiter of the constitutional mandate has yet to realise that the Constitution is not simply a compilation of legal concepts but an embodiment of universal human aspirations.

Who better to remind us of the vision that inspired the founding fathers of the Republic than a judge whose personal and professional life is a shining example of that Constitutional commitment to every citizen of India? The author of this book, Justice Hosbet Suresh, remained true to his professional calling throughout his long career as a judge. And since retirement, he has been the flag-bearer of the human rights' movement in this country, carrying on in the footsteps of his mentor, Justice VR Krishna Iyer.

While occupying the Bench, as a Judge in the Bombay City Civil and Sessions Court between 1968 and 1980 and then as a Judge in the Bombay High Court between 1986-1991, Justice Suresh steadfastly did his duty, delivering on the

Constitution's pledge to the common Indian. On retiring, driven by his indefatigable energy and passionate disposition, responding to the call of various social action groups, this man of conscience has travelled to the remotest corners of the country, and elsewhere in Asia, headed numerous people's inquiry commissions, conducted painstaking investigations and produced incisive reports highlighting the violation of basic human rights.

If there is one member of the Indian judiciary who deserves credit for giving meaning and life to the notion of a people's/citizens' inquiry when the system fails to ensure protection, provide succour and deliver justice, it is Justice Hosbet Suresh.

To name only a few, Justice Suresh has participated in or headed investigations into: the riots following the Cauvery Waters Dispute, Bangalore (1991), the 1992-93 Mumbai riots following the demolition of the Babri Masjid (1992-1993), forced evictions of slum dwellers by the authorities in Mumbai (1994), harmful effects of prawn farming on the eastern coast that led to the Supreme Court of India banning prawn farming (1995), the merciless drowning of Dalits by the Tamil Nadu police (1999), the brutal shooting of tribals in Devas, Madhya Pradesh, food scarcity and militarisation in Burma (1999), and the inquiry into the genocide in Gujarat that led to the report of the *Concerned Citizens Tribunal – Gujarat 2002*. Justice Suresh's contribution to the human rights discourse in the country and the region is immense.

Earlier, this man with a humble beginning made his career at the Bombay bar and rose to dignify the bench. "My voice is my conscience," he always says in response to compliments on the clarity with which he always dictated his judgements on matters of substance and principle. At a time when the higher judiciary has adopted an ostrich like attitude, at best, in matters of justice for ordinary people or issues of life, liberty and equality to all Indians irrespective of their caste, community or gender, Justice Suresh's verdicts stand out in glowing contrast.

Among the judgements delivered by him and one which must rank high in the annals of Indian jurisprudence was his historic verdict in *Subhash Desai v/s Sharad J Rao* (1991 (1) Bom CRP 156) that set aside the election of a member of Maharashtra's legislative assembly (MLA) on the ground that he had misused religion and indulged in religious propaganda to manipulate mass sentiments for votes. His verdict was subsequently followed by a spate of others,

Despite the inordinate delay in our courts, despite the lukewarm response of our judges to matters of grave societal injustice and violation of basic human rights, the common man or woman still retains the hope that through knocking at the doors of our courts wrongs will be righted and justice will be done. Through this book, which is in fact a collection of his lectures, Justice Suresh tugs at the conscience of brother judges and reminds them of their constitutional calling. For, if judges don't deliver justice, in the words of eminent jurist, Fali Nariman, "Where, My Lord, shall we turn?"

It is a great privilege for Sabrang Communications to be given the opportunity to publish this book. We believe that this collection of lectures and the relevant annexures would be of immense value to students of human rights in particular and the human rights movement in the country in general. We hope that the awareness so generated will lead to very many more people joining the small groups at present struggling to create a more humane system.

FOREWORD

For the last six years, I have been giving lectures to students in the Post-Graduate Diploma Course in Human Rights, in the University of Bombay, at the invitation of Dr. Nawaz Mody, Professor and Head of the Department of Politics. The subject broadly has been Human Rights and Fundamental Rights. Some of my students desired that I have my lectures published.

I have always felt that fundamental rights will remain empty words unless they are recognised as human rights. It is the human rights content that gives meaning to fundamental rights. For most of the lawyers and judges, fundamental rights are no more than legal concepts. That is how, though the Supreme Court declared nearly three decades ago that the Right to Life under Article 21 includes the right to food, clothing, shelter and all that goes with human dignity, most lawyers and judges still consider them as inchoate, indeterminable legal jargon only to be used in classrooms and seminars.

In the case of Shantistar Builders (AIR 1990 SC 630) the Supreme Court, recognising the Right to Shelter as falling within the meaning of Article 21, said, "The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal, it is the bare protection of the body, for a human being it has to be a suitable accommodation." Yet, in the last ten years several High Courts have passed orders after orders for demolition of slums in many

cities. All this in the name of the environment or in some cases on the basis of a flawed wisdom that poor citizens have no right to shelter if they enter cities after a certain cut-off date.

Similarly, the Right to Food does not mean the mere sanctioning of certain schemes to distribute food grains to see that the poor, the destitute and the weaker sections of society do not suffer from hunger and starvation. It is much more than that. It is adequate food as part of an adequate standard of living. It also means the right to have physical and economic access to adequate food. How many of our judges and lawyers understand the meaning of the Right to Food?

Again, all human rights are inter-connected and are enforceable. It is wrong to assume that certain economic and social human rights are not enforceable. How to guarantee and enforce human rights are set out in the International Covenants. It is there in Article 2 of International Covenant on Economic, Social and Cultural Rights (ICESCR), when it says that "the State has to take steps... *to the maximum of its available resources*, with a view to achieving progressively the *full realisation of the rights* by appropriate measures." If only courts had insisted upon the states to demonstrate, year to year, what steps it had taken to the maximum of its available resources, many of our citizens would by now have achieved a higher standard of living.

The theme of my lectures was to explain to the students the need to understand human rights, which alone can give real meaning to the study of fundamental rights.

Though I have brought out several reports based on inquiries in respect of various human rights violations, this is my first publication. I have annexed to this compilation of my lectures the sections on Fundamental Rights and Directive Principles in the Constitution of India, the Universal Declaration of Human Rights and other International Covenants and Protocols. As these are key documents on the question of human rights and fundamental rights and

because I have referred to them repeatedly in my lectures, I felt they would be useful to the readers for ready reference.

My thanks are due to Sabrang Communications & Publishing Pvt. Ltd. for accepting the responsibility of publication of this book.

Justice (Retd.) Hosbet Suresh
Mumbai, July, 2003

Lecture I

What are Human Rights?

In its 1987 publication *Human Rights: Questions and Answers*, the United Nations describes human rights as follows:

"Human rights could be generally defined as those rights which are inherent in our nature and without which we cannot live as human beings.

"Human rights and fundamental freedoms allow us to fully develop and use our human qualities, our intelligence, our talents and our conscience and to satisfy our spiritual and other needs. They are based on mankind's increasing demand for a life in which the inherent dignity and worth of each human being will receive respect and protection."

The same publication states:

"The denial of human rights and fundamental freedoms not only is an individual and personal tragedy, but also creates conditions of social and political unrest, sowing the seeds of violence and conflict within and between societies and nations. As the first sentence of the Universal Declaration of Human Rights states, respect for human rights and human dignity 'is the foundation of freedom, justice and peace in the world'."

Minimum legal guarantees

Human rights are universal legal guarantees protecting individuals and groups against actions which interfere with fundamental freedoms and human dignity. As Justice VR Krishna Iyer says: "Human rights are those irreducible minima which belong to every member of the human race when pitted against the State or

other public authorities or groups and gangs and other oppressive communities."[1]

We do not intend to study human rights from any philosophical point of view. Nor do we study human rights from any religious point of view, or for that matter as any part of natural law. Ancient Hindu law has the concept of *Dharma* which is considered as the supreme value which binds kings and citizens, men and women. The concept itself is very wide and comprehensive and in that sense, the scope of *Dharma* would take, in its sweep, all concepts of law and human rights. Islam and Christianity also have many concepts of morality, humanity and spirituality. In fact, all religions preach human justice, human values and harmony to provide for decent human existence. Yet, the history of all religions shows that, at times, it has sided with the king (or the secular authority) to reinforce its legitimacy against individual subordination.

Not any philosophical point of view—not Dharma

Again, human rights is not studied as a part of natural law, as something beyond man-made law. That as a subject differs from what we study as human rights. We study human rights as those rights which every individual possesses by virtue of being a human being and these rights exist at all times and in all places. These rights find expression in the Universal Declaration of Human Rights as "a common standard for all peoples and all nations" and which maintains that "all human beings are born free and equal in dignity and rights."

Not as something beyond man-made

Historically, one of the important instruments referred to in any study of human rights, is the Magna Carta, 1215 AD, accepted by King John at Runnymede. Though it was exacted by his feudal barons in their own self-interest, the following extract in particular (Clause 39) became the symbol of liberty and rule of law: "No free man shall be taken or imprisoned or dispossessed or outlawed or exiled, or in any way destroyed, nor will we go upon him, nor will we send against him except

Magna Carta 1215 AD

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[1] VRK Iyer: *The Dialectics and Dynamics of Human Rights*, page 54.

by the lawful judgment of his peers or by the law of the land." And again: "To no man will we sell, or deny, or delay, right or justice."

Magna Carta was followed by the Petition of Rights in 1628, Habeas Corpus Act, 1640 and 1679, and then by the Bill of Rights in 1689 which declared the rights and liberties of the subjects. Some of these have come to have universal significance, such as the prohibition of illegal and cruel punishments which is found in many international instruments including the Universal Declaration of Human Rights.

Petition of Rights, 1628

Nearly a century later, the American Declaration of Independence (1776) solemnly declared: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights..." Then came the French Declaration (1789) which is considered the classic formulation of the inviolable rights of the individual. Article 1 says: "Men are born free and equal in respect of rights. Social distinctions shall be based solely upon public utility." Article 4: "Liberty consists in the power of doing whatever does not injure another. Accordingly the exercise of the natural rights of every man has no other limits than those which are necessary to secure to every other man the free exercise of the same rights; and these limits are determinable only by law."

American Declaration of Independence

French Declaration

Many of these ideas became the motivating force for people's struggle for liberty, and equality in different parts of the world, including our own Freedom Struggle. Despite all these declarations, even in the United States slavery continued until it was eliminated only about eighty years after from the Declaration of Independence. In many countries women were denied voting rights. Oppression and colonial rule prevailed in many parts of the world, meting out inhuman and cruel treatment to all those who struggled for freedom. There was no universally recognisable and enforceable instrument anywhere in the world.

Motivating force in the struggle for freedom

It was at the end of World War I (1919), that the League of Nations was established to guarantee international peace. However, it could not prevent World War II (1939-1945) which resulted in the killing of millions of people in Europe, as also in the eastern sector after Japan joined the war. Finally, when the Allies, including the Soviet Union, turned the tide and won the world for freedom's cause, they established the United Nations, the Charter of which was signed in San Francisco on 26th June, 1945 by 50 nations. One of its main purposes is the promotion and encouragement of "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion" [Art.1(3)]. The Charter thus made human rights an international concern, rather than a strictly domestic one. Thus it became necessary to spell out human rights applicable to all members of the human family. That is how the Universal Declaration of Human Rights came to be adopted by the UN General Assembly on 10th December, 1948. This is the first comprehensive human rights instrument, agreed amongst all nations setting out the specific rights and freedoms of all human beings.

Failure of League of Nations

UN 1945

Universal Declaration of Human Rights, 1948

The Universal Declaration has 30 Articles covering civil, political, economic, social and cultural rights. Yet, in itself, the Declaration has no legal force. It is a set of moral rules, and as we know, they have found widespread acceptance and incorporation into domestic jurisprudence. With a view to secure adherence of the member states to the principles set out in the Declaration, the United Nations evolved and adopted two covenants in 1966 with binding obligations and the implementation mechanisms attached to them for those states which have accepted the covenants. The covenants are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Human rights, as we study them, are those rights which are contained in these international instruments. They can be broadly classified as follows:

Classification

a. *The right to physical and mental integrity*: the right to life and to liberty and security of the person – including freedom from torture and cruel or inhuman treatment, freedom from slavery, servitude and forced labour; freedom from arbitrary arrest and other deprivations of liberty.

b. *Freedom of conscience and action*: freedom of religion, of opinion and expression and freedom of information; freedom of assembly and freedom to form and join trade unions; freedom of movement, including the right to leave and to return to one's own country.

c. *The right to legal justice*: fair trial in criminal cases, the right to defence counsel, prohibition of the use of criminal laws retroactively.

d. *Privacy and family rights*: the right to respect of one's privacy, respect and protection of the family.

e. *Political rights*: the right to take part in the conduct of public affairs, the right to vote and to be elected.

f. *Social and economic rights*: the right to work, to an adequate standard of living and social security, the right to health services.

g. *Equality and non-discrimination*.

It should not be presumed that these are the only human rights' instruments. There are over 60 international human rights instruments today, and there are various bodies to monitor their implementation. However, it is important to note that the prime responsibility for the protection and promotion of human rights remains with the member states.

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Lecture II

Fundamental Rights and Human Rights

When we drafted the Constitution of India, we were perfectly aware of the Universal Declaration of Human Rights. We were aware that broadly Human rights could be divided into two kinds, viz., Civil and Political Rights and Economic, Social and Cultural Rights. Though our objective was to establish a Socialist, Secular, Democratic Republic so as to secure to all its citizens, "*Justice*, social, economic and political; *Liberty* of thought, expression, belief, faith and worship; *Equality* of status and opportunity; and to promote among them all, *Fraternity* assuring the dignity of the individual..." (Preamble: *The Constitution of India*), we did not incorporate, like many other socialist countries, economic and social rights in our chapter on fundamental rights. However we included some of the important civil, political and cultural rights in the chapter on fundamental rights and made those rights judicially enforceable. Thus, food, clothing, shelter, employment, environment, health, education, and above all, the right not to be exploited find no place in the chapter on fundamental rights. Of course, some of these economic and social rights have been included in the chapter on Directive Principles, but we made them judicially not enforceable.

Civil & political rights in the chapter on fundamental rights

Fundamental rights, just as human rights, are all enforceable against the State and its authorities. Article 12 defines "the State" which includes the Government and Parliament of India, and the Government and Legislature of each of the states, and all local or other authorities under the control of the Government. It is the State that has to guarantee the protection of fundamental rights and prevent its violation. So also, under the Universal Declaration of Human Rights, the states have pledged themselves to promote universal respect for and observance of human rights and fundamental freedoms.

Enforceable against the State

State has to guarantee

Under the international humanitarian law, every State has three obligations—the obligation to respect, the obligation to protect and the obligation to fulfil human rights. The obligation to respect requires the State to abstain from doing that which violates, even directly or indirectly, the concerned human right. The obligation to protect requires the State and its agents to take the measures necessary to prevent other individuals or groups from violating or infringing the enjoyment of the right. The obligation to fulfil requires the State to take measures to ensure each person within its jurisdiction has the opportunities to obtain satisfaction of those needs recognised in the human rights instruments which cannot be achieved by personal efforts. Again, when we say "the State", we mean every department of the State— the Executive, the Legislature and the Judiciary. It is true that in our Constitution the definition of "the State" under Article 12 does not mention the Judiciary. It is not necessary for the simple reason that it is the Judiciary that enforces fundamental rights as against the State. However, a 1967 judgement (*Naresh v/s State of Maharashtra*, AIR 1967 SC 1), a nine-judge Bench has held that (a) judicial decision of a court of competent jurisdiction cannot be said to affect the fundamental rights by itself, and (b) the remedy, if any, will be by way of appeal, revision, review etc. This has been criticised by several authors on constitutional law. Earlier, a seven-judge Bench (*Budhan v/s State of Bihar*, AIR 1955 SC 166) had

Three obligations

State includes every department of State

said that Art.14 would be applicable to all organs of State, which includes judiciary. However, when it was overruled, the Court said that a judicial process only adjudicates a controversy between the parties, and therefore, by itself it does nothing. As against this, the American Supreme Court (Ex-parte Virginia (1880) 100 US 339) had said: "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way". Therefore, the State, when it acts through its judicial branch, violates fundamental rights, such an act could be struck down. This becomes relevant in the present context where several High Courts have passed various orders in certain so-called PIL which are all violative of fundamental rights and the remedies could be a petition under Art.32.

Under the Constitution, we have provided for a relief under Article 32, whereby citizens can directly approach the Supreme Court for the purpose of enforcement of any of the fundamental rights. This right to relief itself is a fundamental right. This is in consonance with the Universal Declaration of Human Rights. Article 8 of the UDHR says: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law." The key words are "effective remedy" and "competent national tribunals". The remedy should be effective so that the victim of violation of human rights gets a satisfactory relief. This is possible by a tribunal which is competent enough to understand human rights and the violation thereof. Moreover, we have provided remedies for the citizens to approach the high courts in its extra-ordinary jurisdiction under Article 226 and 227 of the Constitution, wherever there is any violation of fundamental rights by the State.

Right to relief—a human right

Article 13 of the Constitution of India contemplates that there cannot be any law which is inconsistent with the fundamental rights. Sub-Article (2) states: "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law in contravention of this Clause shall, to the extent of the contravention, be void." Since the State can act only through laws, bye-laws, rules, regulations or ordinance, the State has no power to deprive any person of his or her

No law inconsistent with fundamental rights

fundamental rights. We find a similar provision in the Universal Declaration of Human Rights. Article 30: "Nothing in this Declaration may be interpreted as implying for any State... any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein." This is reflected in both international covenants, in Article 5, para (1) of each of the covenants. The purpose is to provide protection against any misinterpretation of any provision of the international covenants which might be used to justify infringement of any of the rights or freedoms recognised in the covenants or the restriction of any such right or freedom to a greater extent than is provided for therein. The paragraph is also designed to prevent any State, group or person from engaging in activities aimed at the destruction of any of the rights or freedoms recognised in the covenants or at their limitation to a greater extent than is provided for therein. Any State, group or individual engaging in such activities cannot invoke the international covenants to justify them. *(UN's Study Series Vol.3).*

UDHR Art.30

All fundamental rights are for guaranteeing the human rights of the individual. However, as between individual and individual, and as between individuals and the State, there has to be a proper balance. Individual freedom has to be balanced with the freedom of other individuals and with the reasonable demands of the community. It is but natural, the rights and freedoms of the individual are limited by the rights and freedoms of other individuals. In certain cases, the rights and freedoms of the individual may come into conflict with the necessities of the State. Article 29, para (2) says: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitation as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society". This is more elaborately expressed in Articles 4, 5 and 8 of the International Covenant on Economic, Social and Cultural Rights, and also in Articles 4, 5, 12, 14, 18, 19, 21 and 22 of

Balancing of rights

UDHR Art.29

the International Covenant on Civil and Political Rights. For example, Art.4 (of ICESCR) states that the State may subject "such rights only to such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society." It is further made clear under Article 5 para (1) that while there could be limitations on these rights, the State, group or person has no right to "engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognised herein..."

The question is, how do we perform the balancing act of reconciling the rights of the individual with the rights of others and the interests of the community? The UDHR and the covenants themselves provide an answer: "... limitations as are determined by law..." It is the law that has to prescribe the limitations. No individual can put a restriction on another individual for that will lead to anarchy. So also, the law must be for the benefit of "morality, public order and the general welfare in a democratic society". Thus, a democratic society is a pre-requisite for recognition, respect and protection of human rights.

Limitations as are determined by law

In fact, the right to democratic form of governance is itself a human right. See Article 21 (UDHR): 1. Everyone has the right to take part in the Government of his country, directly or through freely chosen representatives. 2. Everyone has the right to equal access to public services in his country. 3. The will of the people shall be the basis of the authority of the Government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. Under Article 25 of ICCPR, every citizen shall have the right "to vote and to be elected at genuine periodic elections which shall be held by secret ballot, guaranteeing the free expression of the will of the electors." It is not a question of having a mere right to vote from time to time. What is important is the link between human rights and democracy. Respect for human rights contributes to the democratisation

Right to democracy—a human right

process. Fundamental liberties, right to express, right to disseminate opinions, right to dissent and, consequently, the right not to suppress and abuse the minorities are all essential for democratic process. Conversely, a democratic decision-making process reinforces the protection of human rights. In this connection a reference to the preamble to UDHR is apt, where it is said: "Where it is essential, if man is not to be compelled to have recourse as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." Thus, democracy, human rights and rule of law are so linked that if you remove any one the result will be antithetical to each other.

Link between human rights and democracy

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Lecture III

Right to Equality

The Universal Declaration of Human Rights begins with the words: "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." It recalls the words of Thomas Jefferson in the American Declaration of Independence: "We hold these truths to be self-evident that all men are created equal...", when it says in Article 1: "All human beings are born free and equal in dignity and rights". Thus, human rights for all is the Magna Carta which no State can deny. That is why in Article 2 it is stated: "Everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". This has been expressly incorporated in ICESCR and ICCPR (Art.2 (2) & Art.2 respectively). States have an obligation to take the necessary steps to give effect to these rights by constitutional process and legislative measures.

Everyone is entitled to all the rights declared in UDHR

Since all rights are to be recognised, it must necessarily be held that there can be no conflict as between rights. On the other hand, all human rights are inter-dependent and they are indivisible. Taking away any one of the human rights will lead to deprivation of other

All human rights are inter-dependent

human rights. In fact they are mutually reinforcing. Thus, promotion of all human rights must be considered as a priority objective in any democratic set up.

Our Constitution, realising the importance of human rights, guarantees certain rights as fundamental. Our Supreme Court has declared that these fundamental rights are one of the basic features of the Constitution, which can never be derogated by any amendment of the Constitution.[2]

Human rights are one of the basic features

One of the important provisions under our Constitution is the Right to Equality: Art.14 says: "The State shall not deny to any person equality before the law, or the equal protection of the laws within the territory of India." Article 7 of UDHR says: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."[3]

Right to Equality

There are two underlying principles in this: *Firstly*, "equality before the law" means that amongst equals the law should be equal and should be equally administered. In other words, likes should be treated alike. It means that there should be no discrimination between persons who are substantially in similar circumstances or conditions. *Secondly*, it follows that unequals also

Unequals cannot be treated as equals

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[2] *Kesavananda Bharati v/s State of Kerala* AIR 1973 SC 1461.

[3] *The Charter of the United Nations*, the *Universal Declaration of Human Rights*, the *International Covenants on Human Rights*, the United Nations' Declaration and the *International Covenant on the Elimination of All Forms of Racial Discrimination*, the *International Covenant on the Suppression and Punishment of the Crime of Apartheid*, the *Discrimination (Employment and Occupation) Convention, 1958 (No.111)* of ILO, the *Convention against Discrimination in Education* of UNESCO, the *Equal Remuneration Convention, 1951 (No.100)* of ILO, and the *Declaration on the Elimination of Discrimination against Women* are among the basic instruments adopted by the United Nations and specialised agencies which expressly provide for equality and the prevention of discrimination.

cannot be treated as equals. As a matter of fact, all persons are not alike or equal in all respects. Application of the same laws uniformly to all of them will, therefore, be inconsistent with the principle of equality.

People could differ as between individuals as between groups of individuals. Such differentiation could be on the basis of race, colour, sex, language, religion, region, birth, status etc. What is important is that there should not be discrimination against any of these groups on the basis of such differentiation. Art.26 of ICCPR says: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." This provision seeks to ensure equality, not identity, of treatment and would not preclude reasonable differentiations between individuals or groups of individuals.

No discrimination

It means that there need not be the same law for all. There could be different laws for different individuals provided that it guarantees or enhances human potential and human dignity for them. In other words, it is open to the legislatures to make classification or differentiation of different groups. However, it has been held by courts in democratic states that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. Our Supreme Court has said in number of cases that (1) classification has to be reasonable, and (2) the differentia must have rational relation to the object sought to be achieved by the statute in question. The test is: Is the classification just and reasonable? If so, what is the objective of the law? Whether the classification so done seeks to achieve that objective?

Classification must be reasonable

In 1974 (*Royappa's Case* AIR 1974 SC 555) our Supreme Court added a new dimension. It said that Article 14 embodies a guarantee against arbitrariness and that it has an activist magnitude. That was a case where an IAS officer challenged an order of his transfer without

Royappa's case

complying with the principle of natural justice. Bhagwati J., while allowing the petition, said: "Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined, or confined' within the traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art.14." In other words, if an action, legislative or executive, is arbitrary it would necessarily violate guarantee of equality as recognised under the human rights law.

Articles 15 & 16 of our Constitution

Articles 15 and 16 of our Constitution contain the principle of the prohibition of discrimination. Art.15 & 16 are as follows: Art. 15: (1). The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to –

(a) access to shops, public restaurants, hotels, and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

It further provides that the State could make special laws for women and children or for the advancement of socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

Art. 16 (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall on grounds only of religion, race caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

It further provides that the State could make laws for the reservation of posts or appointments in favour of socially backward classes of citizens and in favour of the Scheduled Castes and the Scheduled Tribes.

Thus both under UDHR and the Constitution, while there can be no discrimination on certain grounds, the State may be compelled to establish certain social, economic, educational and cultural conditions which are essential to the full development of human potential and human dignity. In other words, the State may bring in permissible discriminatory legislations in the case of certain class of people for the purpose of guaranteeing equality of status and dignity with the rest of the community. That is why under Art.15 (3) & (4) and Art.16 (3) & (4) (4-A) of our Constitution, the State is empowered to make special provisions for women and children and for members of the socially and educationally backward classes or for the Scheduled Castes and Scheduled Tribes. The objective of these constitutional provisions is to balance the interests of the backward classes and the forward classes so as not to affect the provisions of equality enshrined in Articles 14 and 16(1) of the Constitution of India. In the absence of any such provision, the gap between the forward classes and the backward classes would widen and inequality would be perpetuated.

Balancing of interests by permissible discrimination

The Constitution provides for certain special compensatory provisions by way of reservation of seats in the Lok Sabha and Legislative Assemblies for Scheduled Castes and Scheduled Tribes, besides empowering the Government to reserve posts in Governmental Service. (See Art.330, 332, 334, 335 etc.) Under Art.338, a National Commission for Scheduled Castes and Scheduled Tribes has been constituted which has the duty, *inter alia*, to investigate and monitor all matters relating to the safeguards provided for SCs and STs under any law or order of the Government, and to make such reports and to recommend measures for the protection and welfare and socio-economic development of the SCs and STs.

Compensatory provisions— justification for reservation

While these are the provisions for guaranteeing the rights of the SCs and STs, under Art.340, the President has the power

to appoint a commission for investigating the conditions of socially and educationally backward classes and to make recommendations as to the steps that should be taken by the Government to remove such difficulties and to improve their condition. A commission under the chairmanship of BP Mandal was appointed in 1979. It submitted its report in 1980. After about ten years, in 1990, the Government decided to implement its recommendations. Later on, this was challenged in the Supreme Court and a bench consisting of nine judges upheld, by a majority of six to three, the recommendations of the Mandal Commission Report, though subject to certain conditions. In principle the Court upheld the reservations for the socially and educationally backward classes (SEBCs) in Government Service[4]. The basis for the reservations is to balance the interests of the social and backward classes with that of the forward classes, so as not to affect the provisions of equality guaranteed under the Constitution.

Mandal judgment

While the Mandal judgment dealt with certain castes identified as socially and educationally backward, still at the bottom of our caste system we have some 160 million people who live as "untouchables" or Dalits—literally meaning "broken" people. Under Article 17 of the Constitution, we have abolished "untouchability" and its practice in any form is forbidden. Yet Dalits are discriminated against, denied access to land, forced to work in degrading conditions, and routinely abused at the hands of the police and of higher-caste groups that enjoy the State's protection. We have two major Acts—The Protection of Civil Rights Act, 1976, and The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. However, the law has not brought them relief, mainly because the attitude of the people has not changed. Still they are compelled to do the most menial of tasks, such as manual scavengers, street sweepers, removers of human waste and dead animals, leather workers, cobblers etc. Still they cannot use the same wells, visit the same temples, drink from the same cups in tea-stalls. Rightly, this has been described as "hidden apartheid" akin to racial discrimination as practised elsewhere.

'Untouchability'

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[4] See *Indira Sawhney v/s State of Kerala* AIR 1993 SC 477.

One of the main reasons for this situation in the Indian context is the prevalence of the caste system—the world's longest surviving social hierarchy. Under this, every person is born into a caste, the upper-caste being pure and as we go down the lower and the lowest castes being impure, more impure and most impure. Caste also determines the work one has to do: the lowest to do menial work, while the highest, the Brahmins, being pure, to do priestly functions. In our day-to-day life, this distinction has resulted in extreme forms of discrimination, exploitation and violence. It has been rightly considered as "work and descent based discrimination" and as such it imposes enormous obstacles to the full attainment of civil, political, economic, social and cultural rights.

Caste system

In this context we have to refer to the International Convention on the Elimination of All Forms of Racial Discrimination, 1965. India has accepted this Convention. The preamble points out that the basis for the Convention is that all human beings are born free and equal in dignity and rights, and that "all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination." What is contemplated is to eliminate racial discrimination "in all its forms and manifestations". Article 1 defines the term "racial discrimination" as follows: "In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

International Convention on the Elimination of All Forms of Racial Discrimination, 1965

This definition is important. It covers distinctions based on race or colour and also distinctions based on descent and national or ethnic origin. What is contemplated under this definition is the inclusion of any and every action or omission which could be "distinction, exclusion, restriction or preference" based on certain grounds, namely, "race, colour, descent, or national or ethnic origin" resulting in "nullifying or impairing the recognition, enjoyment or exercise of human rights and fundamental freedoms in the political, economic, social, cultural

or any other field of public life." In such a situation, the Convention becomes applicable. The Government of India has agreed to this Convention, and yet it does not want to accept that caste discrimination would fall within the scope of this definition. Caste is based on descent (i.e. birth) and work. Discrimination occurs when individuals are unequally rewarded for identical work or services or excluded from access to opportunities for which they are equally qualified. In any event, discrimination, exclusion or restriction takes place in economic, social and cultural field, particularly against the lower-caste people. The discrimination is because of the stigma of being born into a particular caste. Those who have been stigmatised and discriminated against have remained poor and disadvantaged, and most of them live in sub-human conditions. Their right to enjoy human rights is impaired on a large scale.

In a recent World Conference Against Racism held in Durban, South Africa (between 31st Aug to 7th Sept, 2001), all efforts made by the NGOs and human rights' activists to include "caste" in the agenda of the conference failed. It is unfortunate that the Indian Government took a stand against such inclusion despite the fact that the Government has failed in its attempt to eliminate discrimination based on caste for the last five decades.[5]

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[5] a. Distinction based on gender has not been dealt with and that falls within the scope of the Convention on the Elimination of All Forms of Discrimination against women, 1979. The Government of India ratified this convention on June 19, 1993, and acceded to it on August 8, 1993 with certain reservations.

b. Caste system is found in India, Nepal, Bangladesh, Sri Lanka and Pakistan. Similarly, communities known as *Buraku* in Japan, Osu in Nigeria, certain groups in Senegal and "slave castes" of Mauritania are some of the people who suffer similar discrimination as in the case of low-caste communities in India.

c. The most important clauses of the International Covenant on the Elimination of all forms of Racial Discrimination are Art.1, 2, 4, 5, 6 and 8.

d. A UNESCO Declaration on Race and Racial Prejudice (27th Nov, 1978) says: Art.2 para 2: "Racism includes racist ideologies, *prejudiced attitudes, discriminatory behaviour*, structural arrangements and institutionalised practises... the notion that discriminatory relations between groups are morally and scientifically justifiable..."

Lecture IV

Right to Personal Freedom

Personal freedom means the freedom of every law-abiding individual to think what he will, say what he will, and go where he will and reside where he will without let or hindrance from any other person/s. However, every individual should respect the rights and freedoms of other individuals and carry out his obligations to the community. In other words, the protection of these freedoms depends upon other individuals. It means one may have a right to speak, right to travel, right to assemble—but if someone else interferes, what happens? If such interference is unbridled, there is no guarantee that anyone would be able to enjoy these rights. Therefore, what is required is some kind of conditions of security which will restrain others from effectively violating these rights. This is what the two covenants ICCPR & ICESCR, in para 3 of the preamble says: "Recognising that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom... can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights..." What is important is to create conditions of security for the exercise of these rights.

'Personal Freedom'

We have seen under Art.29 of UDHR that "everyone has duties to the community in which alone the free and full development of his personality is possible." The limitations are to "be determined by law solely for the purpose of securing due

recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." Thus, balancing the rights of each other has to be "determined by law" based on the requirements of "morality", "public order", and "general welfare" in a democratic society.

Balancing of rights

The requirement "determined by law" does not mean any law. The law has to be just and reasonable, which is possible only in a democratic society. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the rights guaranteed under UDHR. In other words, the law cannot be "arbitrary," but it has to be reasonable and just, which is possible only in a democratic society. Very often people are made to believe that tyrannical laws are required for the maintenance of public order and general welfare of the society. However, it is the universal experience of all human beings that tyrannical laws degenerate into deprivation of all liberties of all citizens—sooner or later—gradually, but perceptibly, resulting in the State becoming an instrument of oppression.

'Determined by law'

The objective of UDHR is to evolve international norms for curtailing human rights which can be done only by laws which are reasonable, and which are enacted on the grounds of "morality", "public order", and the "general welfare" in a democratic society. The term "morality" or "morals" is not to be understood in any religious sense. What it broadly means is the right conduct. Moral law is the law of conscience, the aggregate of those rules and principles of ethics which relate to right and wrong conduct and prescribe the standards to which the actions of men should conform to in their dealings with each other.[6] No one can justify his immoral behaviour by invoking his individual human rights. However, it is the law that must regulate on grounds of morality and it is for the courts to judge whether it could be justified on the basis of reasonableness. The term "public order" should ordinarily mean the absence of "public disorder". It is generally associated with the behaviour of any

'Morality'

'Public order'

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[6] *See Para 208 at Pg 120, Vol 3. UN Study Series, Human Rights.*

individual or group of individuals in a manner which is offensive and likely to result in breach of peace. Though it is difficult to define, it can always be understood in the light of the human right concerned which is restricted by the reference to public order. The examples could be such laws which prohibit unlawful assembly, or laws prohibiting incitement to communal enmity. How would the State control a mob or a riot, and to what extent? It should necessarily involve the exercise of police power by the State. While the State exercises its police power which results in limitation on individual human rights, the limitation of police power itself constitutes a guarantee for the protection of human rights.[7] Such a restriction on the exercise of police power becomes possible in a democratic State. In other words, there can be no excessive use of police power than is believed to be necessary in the facts and circumstances of each situation.

'General welfare'

So also, human rights could be restricted in the name of "general welfare", "public interest" or "general interest" etc. These concepts vary from State to State. In a developing country where there is a wide disparity amongst the people, as between the rich and the poor, the advantaged and the disadvantaged, there could be greater restrictions on individual human rights. The State, therefore, has a greater responsibility in prescribing limitations on human rights, which should also balance the interests of all differing groups.

Article 19 of the Indian Constitution

Under the Indian Constitution, Articles 19(1) (a) to (g) provide for personal freedoms and sub-Articles (2) to (6) provide for reasonable restrictions.[8] Thus the freedom of speech and expression is subject to law which imposes reasonable restrictions "in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign

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[7] See: *Para 1003, at Pg 176, Vol 3, UN Study Series, Human Rights.*

[8] Art.19 (1) All citizens shall have the right (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely through the territory of India; (e) to reside and settle in any part of the territory of India; (f) ... (and) (g) to practice any profession or to carry on any occupation, trade, or business.

states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence". The freedom to assemble peacefully is subject to the country's integrity, sovereignty and public order. The freedom to form associations or unions is also subject to a similar restriction. The freedom to move freely and reside and settle is subject to the interests of the general public. So also, the freedom to practice any profession is subject to a similar restriction.

Article 19 UDHR

Article 19 of UDHR provides for freedom of opinion and expression. It says: "this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers." Article 19(2) of ICCPR is in similar terms, and sub-para (3) provides for certain restrictions by law for the protection of national security or of public order, public health or morals. Thus, freedom of speech and expression includes freedom of opinion and freedom to seek, receive and impart information. The Supreme Court has also declared that the Right to Information falls within the scope of Article 19(1) (a) of our Constitution. However, these rights are subject to limitations as may be imposed by law in the collective interests of the society. At the same time, while regulating the exercise of the right, if it injures or delimits the very "substance" or "content" of the right itself so as to virtually abolish it, or conflicts with other guaranteed rights, the Court would strike down such limitations as unreasonable.[9] This is exactly what Art.5(1) of ICCPR says: "Nothing in the present Covenant may be interpreted for any State...any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant." In other words, restrictions have to be reasonable to the extent that it is necessary in a democratic society.[10]

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[9] See *Bennett Coleman v/s Union of India,* AIR 1973 SC 106.

[10] Some of the requirements of a democratic society are: (i) Freedom of expression (ii) Freedom of opinion and political debate

(iii) Right to a fair trial (iv) Right to access to courts of law (v) Impartial administration and accountability (vi) Fair treatment of the minorities (vii) Representative Government (viii) Local self-government etc.

Article 20 of UDHR is equivalent to Article 19(1) (b) of our Constitution. Article 21 of ICCPR after providing for recognition of the right of peaceful assembly mentions the same restrictions which are necessary in a democratic society in the interests of national security, public order, public safety, public health. So also with regard to freedom of associations or unions, Article 22 of ICCPR provides for similar restrictions, as mentioned above. In the United states, the Supreme Court, while interpreting the American Constitution, had to invent what is known as the doctrine of "police power" of the State, under which the states has the inherent power to impose such restrictions on fundamental rights as are necessary to protect the common good, such as public health, safety, morals etc. However, this exercise of police power is subject to "due process" (i.e. 14th Amendment) which has an all- pervading effect on all administration in the United States. Thus the question of limitation is entirely in the hands of the Courts. On the other hand, the Indian Constitution seeks to specify the scope of limitations in the Constitution itself.

Article 20 UDHR

Article 13 of UDHR says: "Everyone has the right to freedom of movement and residence within the borders of each State." This right includes an individual's right to leave any country, including his own, and to return to his country. Article 14 provides for the right to seek asylum from persecution, in any country. They are equivalent to our Article 19(1) (d) & (e). Articles 12 and 13 of ICCPR are the corresponding Articles. They are subject to similar restrictions as mentioned above.

Art. 13 & 14 UDHR

What are reasonable restrictions? The difficulties arise with regard to such notions as "national security", "security of the State", "public order", "public interest" and "decency or morality". The ground of "national security" is generally considered as permissible limitation on the freedoms of movement, expression, assembly, and association. The idea is to avert danger to national security by restricting human rights. Generally, the Court decides on

Reasonable restrictions

the basis of the substance of the law whether such restriction has become necessary in view of the danger to security, safety, public order. While it is not possible here to have a detailed study of the restrictive laws and the plethora of cases decided by the Supreme Court, what is relevant for students of human rights is to consider the possibilities of such laws being unnecessary or the likelihood of such laws being either abused or of the authorities under the law using excessive powers to contain legitimate exercise of human rights by people. This happens very often in the matter of controlling riots, demonstrations, protest meetings etc. These are all matters pertaining to public order, but, the general experience of all protestors and human rights defenders is that the police use excessive force.

S.129 of our Criminal Procedure Code provides for dispersal of unlawful assembly by any police officer not below the rank of a sub-inspector. Before any force can be used, three pre-requisites are to be satisfied. Firstly, there should be an unlawful assembly with the object of committing violence. Secondly, such assembly is ordered to be dispersed, and thirdly, inspite of such orders to disperse, such assembly does not disperse. S.130 CrPC provides for use of armed forces. However, the officer of the armed forces shall use as little force, and do as little injury to person and property as may be consistent with the dispersal of the assembly and arresting and detaining such persons. Ordinarily, the armed forces have to act under the orders of the Executive Magistrate. S.132 CrPC gives protection against prosecution for acts done under the preceding sections and they can be prosecuted only with the sanction of the Government.

The provisions referred to above do not give any absolute right to the police to kill or cause injury. They have the power to use force to the extent necessary, i.e., as may be consistent with dispersing the crowd and arresting or detaining any such persons indulging in acts of violence. In other words, the force used must always be moderate and proportional to the circumstances of the case. The use of force is something akin to the use of force in exercise of the right to private defence of person or property.

S.100 of the Indian Penal Code confers on every person including a police officer to use force in the exercise of the right of private defence of the body to the extent of causing death or any other harm to the assailant, if there is a reasonable apprehension that death or grievous hurt will otherwise be the consequence. In fact, there is no provision in the Constitution or in any law which says that the police can choose to kill in the name of public order. They have a right to defend which may extend to kill any one provided the circumstances fall within the scope of S.100, IPC.

S.100 IP Code

In all states, there is the police manual, containing rules relating to use of force by the police. Ordinarily, a report is made to the higher authorities at the conclusion of "Mob Operations". The report should contain full details of the incidents, and if firing is resorted to, the report should show the number of rounds fired, the bullets used, the particulars of the injured or dead. Wherever injury or death is caused to the members of the crowd, the local Executive Magistrate is required to hold an enquiry. The enquiry is not by a Judicial Magistrate. In many places, the executive magistrates are the collectors, and in the city of Bombay, even the police inspectors attached to a police station. In this enquiry, there is no right of appearance for any injured or the kith and kin of the deceased. It is not an open enquiry. At the end of the enquiry, the Executive Magistrate makes a report which is not made public, and the citizens cannot judge whether the police had acted fairly or in just manner or not. Rarely does an Executive Magistrate censure the police, and even then no action is taken against the errant police.

In 1990, the United Nations has formulated Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (See Annexure for the full text). These principles should be taken into account and respected by governments within the framework of their national legislation and practice, and be brought to the attention of law enforcement officials, as well as other persons, such as judges, prosecutors, lawyers, members of the executive branch and the legislature, and the public. The important principles are:

UN basic principles

Art. 4 & 5: They provide for maximum restraint on the use of force and firearms, with the minimum of damage and injury, and respect for human life. Articles 7 and 8 are as follows:

Art.7: Government shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law.

Art.8: Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.

Art. 9 provides for use of firearms only for self-defence.

Art. 22: "Governments and law enforcement agencies shall establish effective reporting review procedures for all incidents referred to in principles 6 and 11 (f). For incidents reported pursuant to these principles, Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control." The key words are "administrative review" and "judicial control". Therefore, in all cases of death and serious injury there has to be a judicial inquiry.

Article 23 provides for a special and independent process, including a judicial process for getting justice for persons affected by the use of force and firearms.

Article 24 fixes the responsibility on the senior officers, and Article 26 points out "Obedience to superior orders shall be no defence if law enforcement officials knew that an order to use force and firearms resulting in death or serious injury of a person was manifestly unlawful and had a reasonable opportunity to refuse to follow it." In any case, responsibility also rests on the superiors who gave the unlawful orders.

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Lecture V

Right to Religion

Article 18 of UDHR says: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change one's religion or belief, and freedom, either alone or in community with others, and in public or private, to manifest one's religion or belief in teaching, practice, worship and observance." More elaborately, in Article 18 of ICCPR, this has been stated as follows:

Art.18 UDHR

Art.18 ICCPR

"1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable,

legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."

Along with this one has to read Art.20 (2): "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." And Art.27: "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

Under our Constitution, Article 25 guarantees freedom of religion. It says:

Article25 Constitution of India

"(1). Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

(2). Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law— (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."

The other related Articles are Art.26, 27, 28 providing for freedom to manage religious affairs, freedom not to pay taxes for promotion of any particular religion and freedom not to attend any religious instruction in educational institutions. These Articles have to be read with Art.19(1)(a) freedom of speech and expression, Art.19(1)(c) freedom of association, Art.14 guaranteeing equality and Art. 21 guaranteeing right to life and liberty.

Freedom of thought, conscience and religion

The key words are "freedom of thought, conscience and religion". Article 19 of ICCPR says that "everyone shall have the right to hold opinions without interference". A thought process may lead to an opinion, and opinion in turn may result in expression. While there could be certain restriction on freedom of

expression, there can be no interference on freedom of thought. The word "conscience" indicates choice. It refers to that deep subjective sense of what is right or wrong, which is inherent in all human beings. The rights of freedom of thought and conscience always go with freedom of religion. They are all exercised inside an individual's heart and mind. Thus, freedom of religion does not mean freedom to a particular religion only, to which an individual belongs. In other words, it does not mean that it is freedom to be Hindu and Hindu only, or to be a Christian and a Christian forever. It should necessarily mean freedom to change. One must be free to change one's religion, if one feels one should change. If in his conscience a person feels that his religion is not the right one for him, he should be able to change. Thus freedom of conscience means that there is freedom of choice–a choice to have religion, or change one's religion, or for that matter, not to have any religion at all.

Freedom to profess, practise and propagate

Freedom of religion includes the freedom to teach, practise and propagate one's religion and religious beliefs. The right to propagate gives meaning to choice of religion. Choice involves not only knowledge, but also an act of will. You choose a religion because you know what it is. You must have knowledge, you must understand, and then only can you change. You must understand what the other religion is, if you want to change. A person cannot choose if he/she does not know what choices are open. When Article 25 of our Constitution mentions "the right freely to profess, practice and propagate religion," it means that it is not enough if you profess, it is not enough that you can practise; you should also have the freedom to propagate. In a democracy you propagate to change others' minds, to bring them around to your point of view. How do you propagate? What is the object of propagation? To see that the other person is convinced of what you are saying.

Freedom of propagation is a part of the freedom of speech and expression. This includes "the freedom to hold opinions and to receive and impart information and ideas" (See Article 19(2) ICCPR). As stated by the European Commission, "...It is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or a matter of indifference, but also to those that offend, shock or disturb the

State or any sector of the population. Such are the demands of that pluralism, tolerance and broad-mindedness without which there is no democratic society."[11]

Under the Indian Constitution, it can as well be subject to reasonable restrictions as may be provided by law made in the interests of the security of the State, public order, decency, morality etc. (See Art.19(2)). We have statutory provisions in S.153(a) of the Indian Penal Code which deals with promoting enmity between different groups on grounds of religion, race, etc. Sections 295 and 295(a) of the IPC deal with defiling places of worship or doing acts intended to outrage religious feelings or beliefs. All these are offences. So also, under Article 20(2) of ICCPR: Any advocacy of national, racial or "religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." What is prohibited is propagation of "religious hatred". However, if anyone propagates one's religion and religious beliefs, that, by itself, can never be considered as "advocacy" of religious hatred. If someone violently reacts to any one's propagation of his beliefs, that other person should be considered as liable for prosecution under the penal provisions mentioned above. So, it is the latter who has to be silenced and not the former.

"Subject to Public Order, Health and Morality"

If propagation is a part of freedom of speech and expression [Art.(19)(1)(a)] and also included in the concept of religion (which is the right freely to profess, practise and propagate religion [Art.25(1)], the same can be restricted only on the grounds mentioned under Article 19(2) and not otherwise. However, there can be no restriction on the person who pursuant to propagation, chooses to change his religion. That is the meaning of freedom of conscience–freedom to choose or not to choose a particular religion which is being propagated with a view to its acceptance. Thus, there could be a difference between "freedom to convert"

Right to convert

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[11] Case of *Handyside v/s United Kingdom* (1976). The case is about an individual publishing a reference book for school children; its content also contained sexual advice.

and "freedom of conversion". The former could include propagation which is subject to public order, health, morality, security of the State etc. but there can be no restriction on the latter. It is my conscience that decides what I should choose and what I should not and that right is absolute.

The Supreme Court

Unfortunately, the Supreme Court did not understand the several concepts involved in Article 25(1). The occasion arose in the case of *Rev. Stanislaus v/s Madhya Pradesh* (AIR 1977 SC 908). The states of Orissa and Madhya Pradesh had enacted the Freedom of Religion Act in 1967 and 1968 respectively, prohibiting forcible conversion. The Acts were challenged. The Orissa High Court struck down the Act as *ultra vires* of Article 25(1) of the Constitution. However, when the matter came to the Supreme Court, the Acts were upheld and the Court observed as under: "...We have no doubt that it is in this sense that the word 'propagate' has been used in Art.25(1), for what the Article grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets. It has to be remembered that Article 25(1) guarantees freedom of conscience to every citizen, and not merely to the followers of one particular religion, and that, in turn, postulates that there is no fundamental right to convert another person to one's own religion because, if a person purposely undertakes a conversion of another person to his religion as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the freedom of conscience guaranteed to all the citizens of the country alike." Needless to say, the Supreme Court judgment contains certain fundamental fallacies. It seems to suggest that the right to propagate is not for conversion, but only for spreading one's religion by an exposition of its tenets. How does one spread one's religion, if one is not allowed to persuade others to accept one's religion? Where is the question of propagating one's religious tenets to the very persons who

are within one's own religious group? Again, if on propagation, the other person exercises his right to choose, how does that impinge on his conscience? If conversion takes place through force or fraud, what is to be prohibited is the exercise of force or fraud, and not the right to conversion.[12]

Though we have guaranteed freedom of thought, conscience and religion, there are many areas where such freedom is denied. For example, under the Hindu Marriage Act, 1955, conversion by any spouse to another religion becomes a ground for divorce. How can a mere conversion affect one's married life, unless it affects his/her health or morality? Similarly, under the Hindu Adoptions and Maintenance Act, 1956, a wife has no right to claim maintenance, if she is "unchaste or ceases to be Hindu by conversion to another religion". So also, under the Hindu Succession Act, 1956, none of the convert's children or their heirs would be entitled to inherit the property of their Hindu relatives. Some of these restrictions are found even in other communities and religious groups.

Denial of this right in personal laws

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[12] HM Seervai: "Constitutional Law of India". He has also criticised this judgment.

Lecture VI

Right to Life and Liberty

Article 3 of the Universal Declaration of Human Rights says: "Everyone has the right to life, liberty and security of person." This has been reiterated in the International Covenant on Civil and Political Rights under Article 6, which says: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." The key words are that this right shall be "protected by law" and shall not be "arbitrarily deprived". In other words, while the law is required to protect life, law itself cannot provide for arbitrary deprivation of life. It means that the law must provide for safeguards against any arbitrary deprivation of life by the State. The question is not one of legality or illegality, but one of not only being legal but also being just.

Right to life under UDHR

When we drafted the Constitution, we were fully conscious of the freedom struggle which was essentially a struggle for liberty and life with human dignity. It was not merely a transfer of power. We were also aware of the UDHR and the importance of human rights. We had the example of the Anglo-Saxon law and the American "due process". In Magna Carta (1215 AD) it is stated: "No man shall be taken or imprisoned, disseised or outlawed, or exiled, or in any way destroyed, save by the lawful judgment of his peers or by the law

Drafting of our law

of the land" (Art.39). In the Petition of Right (1628) the prayer was: "That freedom be imprisoned only by the law of the land, or by due process of law, and not by the King's special command, without any charge." Here the English approach was to use both the expressions to mean that the King shall not act contrary to the existing laws, and not that the law itself should be in conformity with due process of law. However, under the American Constitution, "the due process" clause operated as a limitation as against law itself. The Vth Amendment says: "No person shall be deprived of his life, liberty or property without due process of law." Later, by the 14th Amendment, this was made applicable against all the states in USA. Under the American Constitution, the Fundamental Rights (i.e., the first Ten Amendments) had no restrictions as in our case under Art.19(2) to (6) which provided for "reasonable restrictions". Since there could be no absolute rights, the Court evolved what is known as the doctrine of "Police Power". This enabled the State to impose reasonable regulations of rights for the purpose of the preservation of the community from injury. However, the restrictions had to be subject to "due process". The result is that the regulation which the State may impose in exercise of the police power, to safeguard collective interest, must not be arbitrary or oppressive. Initially, it was thought, "due process" had only prescribed limitation on procedure, meaning thereby the procedure which deprives one's liberty cannot be arbitrary or unreasonable. Later on, the Supreme Court developed "due process" as a dynamic concept, and it came to be applied to matters of substantive law as well. In fact, the phrase "without due process of law" appeared to have become synonymous with "without just cause" and the Court is the judge of what is "just cause".

This is precisely what our Constituent Assembly members wanted to avoid. They thought that Parliament being supreme, the Court should have no jurisdiction to decide what is fair and what is not fair when it comes to any legislation. It was also felt that "due process" would be undemocratic, as it would mean the Court sitting in judgment over the will of the Legislature. Still there remained the question, what happens if Parliament makes a bad law. After considering the dangers on both sides, we finally

approved Article 21, as it is now: "No person shall be deprived of his life or personal liberty except according to procedure established by law." Having drafted Art.21 in the manner as mentioned above, it was felt that the Parliament could make any law and any procedure that would deprive one's life or liberty. Therefore it was felt that there should be sufficient safeguards against arbitrary arrest and detention. So we incorporated two provisions Art.22 (1) & (2) to and Art.20.

Art.21 of the Constitution of India

Articles 22 sub-clauses (1) & (2) are as follows: "(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. (2) Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to Court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate."[13] This provides for certain procedural safeguards against arbitrary arrest and detention. Firstly, the arrested person should be informed of the grounds of arrest. Secondly, he shall be produced before the nearest magistrate within 24 hours of his arrest. Thirdly, he can be continued in custody only with the authority of a Magistrate. Fourthly, he has a right to consult and to be defended by a legal practitioner.

Art.22 (1) & (2)

These provisions are not new. In the Criminal Procedure Code of 1898 (S.54- S.65) as also in the present code of 1973, Sections 41 to 60 state in detail when a person can be arrested. No police officer may arrest anyone without a proper ground as mentioned in these provisions. If a person has to be arrested under a warrant, the warrant must specify the offence and that must be shown to the person concerned. (S.55) The arrested person shall be produced before a Magistrate within 24 hours and without the authority of the Magistrate, further detention is

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[13] Note: This is followed by provisions for preventive detention (Art.22(3) to (7) which we will study later on.

not permissible. (S.57). All these salutary principles were from the English law which are in the procedural code. However, by including them in the chapter on Fundamental Rights, they become part of the basic features of our Constitution, the objective being to guarantee that there shall be no arbitrary arrests or detention without judicial sanction.

Article 9 UDHR says the same thing: "No one shall be subjected to arbitrary arrest, detention or exile." This has been elaborated in Article 9 of ICCPR, which is as follows:

Art. 9 UDHR

"1. Everyone has the right to liberty of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. "Anyone who is arrested shall be informed, at the time of arrest, of the reasons of his arrest and shall be promptly informed of any charge against him.

3. "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and should occasion arise, for execution of the judgement."

The Supreme Court in the case of *Joginder Kumar v/s State* [1994 (4) SCC 260] voiced its concern about violations of human rights because of indiscriminate arrests as against increase in crime rate. It said: "A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges on the one hand, and individual duties, obligations and responsibilities on the other, of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively..." After considering several judgments and in view of the increasing complaint of arbitrary arrests and custodial deaths, the Supreme Court, in the case of *DK Basu v/s State of West Bengal* (AIR 1997 SC 610) sought to lay down 11 guiding

DK Basu's case

principles to be "followed in all cases of arrests or detention till legal provisions are made in that behalf as preventive measures."

The most important are: police officer to prepare a memo of arrest at the time of arrest which shall be attested by one member of the family or any respectable person of the locality; the person arrested to be informed of his right to have someone informed of his arrest; the arrestee's right to be examined both at the time of his arrest and within 48 hours after arrest, of any minor or major injuries on his body; the copies of all the documents including the memo of arrest and the inspection memo to be forwarded to the concerned Magistrate; and his right to meet his lawyer during interrogation.[14]

Article20

While the above provided some of the procedural guarantees, in Article 20, we have certain substantial guarantees: Art.20 is as follows:

"(1). No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law at the time of the commission of the offence.

(2). No person shall be prosecuted and punished for the same offence more than once.

(3). No person accused of any offence shall be compelled to be a witness against himself."

Again, these provisions do not say anything new. But with the incorporation of these as fundamental rights they put restrictions on the Parliament itself from enacting any law in deprivation or derogation of these rights. No criminal prosecution can be initiated against any one, unless the act complained of is an offence at the time it was committed. In other words, the State cannot enact a law for declaring any act to be a crime and give retrospective effect to the same. If the Legislature passes a retroactive criminal law, the Court will not only strike down such law as unconstitutional, but also set aside any conviction made under such law. Art.11(2) of UDHR and Art.15 of ICCPR also lay down the same principle: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under

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[14] The relevant part of the judgment is in the Annexure.

national or international law, at the time it was committed". Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed. So also the immunity against double jeopardy is not new. S.403 CrPC of 1898 and now S.300 CrPC 1973, provide for the same. Article 14(7) of ICCPR also says: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

Article 20(3)

Art.20(3) is relevant, particularly when we study later on fair-trial principles and a law like TADA. Art.14(3)(g) of ICCPR spells this out as one of the minimum guarantees in any fair-trial: "not to be compelled to testify, against himself or to confess guilt." Under our criminal jurisprudence, the presumption of innocence is the all-pervading principle pertaining to all criminal trials. As we generally say, the onus is on the prosecution to prove the case beyond reasonable doubt. There is no short-cut to investigation by compelling the accused to confess. There are several provisions in the Criminal Procedure Code which prohibit the police from extracting such confessional Statements. U/s. 161 CrPC, while any police officer making any investigation may examine orally any person (which would include the accused) acquainted with the facts and circumstances of the case, the person concerned is not bound to answer if such an answer has "a tendency to expose him to a criminal charge or to a penalty or forfeiture."

U/s. 162 CrPC no statement made to the police is admissible in any trial. Moreover, Statements made to the police are not to be signed. U/s. 25 of the Indian Evidence Act, "No confession made to a police officer, shall be proved as against a person accused of any offence." U/s. 163 CrPC, no police officer shall offer any threats or inducement to any person; and any statement made by an accused person under threat, inducement or promise becomes irrelevant in a criminal trial (S.24 Indian Evidence Act). It is only u/s 164 CrPC that a confessional statement may be made by an accused, but it shall be before a Magistrate who should be satisfied that the accused is making a confession voluntarily and of his own free will. However, a statement made

u/s 164 CrPC is not substantive evidence and it can only be considered as a corroborative piece of evidence. Again, in the case of an approver or accomplice, it is the judge who records his incriminating statement provided the judge is satisfied that the accused is making a full and true disclosure of all facts. (S.306 CrPC). Even at the trial, the accused may be called upon to explain any circumstances appearing against him, but if he refuses to answer or if he gives answers which are false; no punishment can be imposed on him (S.313 CrPC). No accused person can be called as a witness except on his own request in writing, and his failure to give evidence shall not give rise to any presumption against him. (S.315 CrPC).

Convention Against Torture

Article 5 of UDHR says: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." This is included in Article 7 of ICCPR. "Torture" has been defined in the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984). It means: "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession..." It is universally known that the law enforcement personnel, such as police, inflict torture on persons charged with any criminal offence and arrested by them, for the purpose of getting information or confessions, and that has become the easiest way of investigating cases. The Covenant calls upon all the states to ensure that all acts of torture are made offences and punishable under their criminal law (Article 4). The State has also an obligation to include education and information regarding the prohibition against torture, in the training of law enforcement personnel who are concerned with arrest and detention of accused charged with criminal offence.

It is unfortunate that such third degree methods of investigation are still the order of the day in all the police stations.

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Lecture VII

Right to Life and Liberty — Continued

Article 21 by itself is a colourless Article. The key words in Article 21 are "life", "liberty" and "procedure established by law". The question is, how do we interpret "Right to life", "Right to liberty" and "Right to a procedure established by law"? Article 367(1) suggests that the interpretation should be in the same manner as in the case of an Act of the Legislature. Our General Clauses Act, 1897 provides for interpretation of statutes. However, when we interpret constitutional provisions, especially those related to human rights, is it not possible for us to look into Universal Declaration of Human Rights or such international covenants as are dealing with these human rights? Initially, our Supreme Court was reluctant to do any such exercise. When Emergency was imposed in 1975 and fundamental rights were suspended and the right to access to justice was denied, several petitions were filed challenging detentions during the said period under MISA 1971. However, the Supreme Court in the case of *ADM Jabalpur v/s. Shivkant Shukla (1976) 2 SCC 521,* while rejecting those petitions by majority of four judges to one, refused to take into account the provisions of UDHR. They said that these attempts "amount to nothing more than appeals to weave certain ethical rules and principles into the fabric of our Constitution which is the paramount law..." (Beg J. at para 201) and "no outside interference" (para 202) could be

Interpretation

tolerated. It was Khanna J. the dissenting judge, who took note of the fact that there existed different declarations, including the UDHR, and stressed the importance of sanctity of life and liberty. He said: "The right not to be deprived of one's life or liberty without the authority of law was not the creation of the Constitution. Such right existed before the Constitution came into force. The fact that the framers of the Constitution made an aspect of such a right a part of the fundamental rights did not have the effect of making Article 21 to be the sole repository of that right." (para 531). In fact, all human rights should be enforceable, whether they are included in the chapter on Fundamental Rights or not. Since all human rights are inter-dependent, legal ingenuity demands that they be so interpreted as to bring them within the parameters of the provisions of one or the other fundamental rights.

This is exactly what the Supreme Court did, about a decade or so later. Several provisions of international covenants were read into our constitutional mandates. In *Francis Coralie v/s. Union Territory of Delhi (AIR 1981 SC 746)*, Bhagwati J. posed the question: "...whether the right to life is limited only to protection of limb or faculty, or does it go further and embrace something more," and answered: "We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and co-mingling with fellow human beings."[15] This has been repeated in several other cases. In *Shantistar Builders v/s. Narayan Khimalal Totame (AIR 1990 SC 630)*, the Supreme Court said: "Basic needs of man have traditionally been accepted to be three—food, clothing, and shelter. The right to life is guaranteed in any civilised society. That would take within its sweep

'Life'—meaning all that goes with life

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[15] This was the case of a British National who was arrested and detained under COFEPOSA Act, and was denied interview with her lawyers and meeting her little daughter, save once a month, by virtue of sub-clauses (i) and (ii) of Clause 3(b) of conditions of detention laid down by Delhi Administration. Those sub-clauses were struck down as *ultra vires* Art.14 and 21.

the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in." In the case of bonded labourers—*Bandhwa Mukti Morcha Case (AIR 1984 SC 802)*, the Court said: "It is the fundamental right of every one in this country... to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Art.21, derives its life-breath from the Directive Principles of State Policy and particularly Clauses (e) and (f) of Art.39 and Arts.41 and 42, and at least, therefore, it must include protection of the health and strength of the workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity..." In *Mohini Jain's Case (1992 3 SCC 666)*, Kuldip Singh J. said: "Right to life is the compendious expression for all these rights which the courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue." Article 21 now applies to various facets of life and living.

Right to shelter and right to livelihood

In *Olga Tellis (AIR 1986 SC 180)*, the question was one of right to shelter of slum and pavement dwellers in Bombay. The Government and the Municipal Corporation wanted to evict and deport all pavement dwellers. The Supreme Court not only recognised their right to dwell on pavements and slums as part of Right to Life under Article 21, but it also observed that by evicting them, their right to livelihood would also be affected. It said: "An... important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective and meaningfulness, but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life"

In *Shantistar Builders (Supra)*, the Supreme Court observed: "The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal, it is the bare protection of the body, for a human being, it has to be a suitable accommodation which would allow him to grow in every aspect—physical, mental and intellectual..."

In *Chameli Singh & Ors. v/s. State of UP & Anr (1996 2 SCC)* at pg 549, it was elaborated: "In any organised society, right to live as a human being is not ensured by meeting only the animal needs of man. It is secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth. All human rights are designed to achieve this object. Right to live guaranteed in any civilised society implies the right to food, water, decent environment, education, medical care and shelter. All civil, political, social and cultural rights enshrined in the Universal Declaration of Human Rights and the conventions or the Constitution of India cannot be exercised without these basic human rights. Shelter for a human being, therefore, is not a mere protection of his life and limb. It is his home where he has opportunities to grow physically, mentally, intellectually and spiritually. Right to shelter, therefore, includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation, and other civic amenities like roads etc., so as to have easy access to his daily avocation. The right to shelter, therefore, does not mean a mere right to roof over one's head, but to the entire infrastructure necessary to enable them to live and develop as a human being. Right to shelter when used as an essential requisite to the right to live should be deemed to have been guaranteed as a fundamental right... The ultimate object of making a man equipped with right to dignity of person and equality of status to enable him to develop himself into a cultured being. Want of decent residence, therefore, frustrates the very object of the constitutional animation of right to equality, economic justice, fundamental right to residence, dignity of person and right to live itself."

The greatest achievement of the Supreme Court, during the last five decades of the Constitution and freedom, is the

expansion of the scope of Article 21 of the Constitution so as to bring every basic human right within its ambit. Thus all basic human rights are fundamental rights by virtue of the repeated judicial pronouncements from the apex court. As stated in the case of *Unnikrishnan v/s State of AP* [(1993)1 SCC 645, in para 165.] "In order to treat a right as a fundamental right it is not necessary that it should be expressly stated as in Part III of the Constitution. The provisions of Part III and Part IV are supplementary and complementary to each other. "The effect of holding all such basic rights as fundamental rights is not that every hungry man will knock at the door of the Court for food, or a foot-path dweller with no roof over his head will ask for a home in the Court room, or a job-less, unemployed man will seek for a livelihood through Court. It only means that basic human rights which are all implicit in the right to life cannot be deprived except in accordance with procedure prescribed by law. If there is a law providing for any basic human right, implement the law. If the law is deficient, and the deficiency results in deprivation of the basic rights, that becomes the violation of Article 21. So also, if there is no law, the Government cannot take shelter under a plea of want of law and deprive basic human rights, for that also results in violation of Article 21.

Right to food

The question of right to food as an enforceable right arose for the first time in the case of *Kishen Pattnayak & Anr. v/s. State of Orissa (1989) Supp (1) SCC 258.* It was in respect of two districts Kalahandi & Koraput in the State of Orissa where people were facing starvation deaths on account of extreme poverty. The Court gave certain directions and the petition was disposed off. Now, after about thirteen years, yet another petition has been filed by the PUCL in respect of the same area demanding "entitlement of food" as an integral part of "protection of life" under Article 21. The matter is still pending and the Supreme Court has given certain directions.[16] Meanwhile, one other petition has been filed in the Nagpur Bench of the Bombay High Court in respect of certain malnutrition deaths amongst children in Melghat area, a tribal region in Maharashtra, and the same is pending.

In an old case: In *Re. Sant Ram (AIR 1960 SC 932)*, the Supreme Court had said: "The argument that the word 'life' in Article 21... includes 'livelihood' has only to be stated to be rejected..." However, after 25 years, the Court said in *Olga Tellis (Supra)*, "If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means to livelihood to the point of abrogation..." In *Delhi Transport Corporation (AIR 1991 SC 101)*, the Court said: "Income is the foundation of many fundamental rights, and when work is the sole source of income, the right to work becomes as much fundamental..." However, in *Delhi Development Horticulture Employees Union (AIR 1992 SC 789)*, the Court hesitated to say that the right to livelihood is not yet incorporated as a fundamental right, because "the country has so far not attained the capacity to guarantee it, and *not* because it considers it any the less fundamental to life..."

Right to work

In *Mohini Jain v/s. State of Karnataka (1992) 3 SCC 666*, the Supreme Court, for the first time, recognised Right to Education as a part of right to life: "'Right to life' is the compendious expression for all those rights which the courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from the right to life. The right to life under Art.21 and the dignity of the individual cannot be assured unless it is accompanied by the right to education." The Supreme Court had observed in this case that the State is under a constitutional mandate to provide educational institutions at all levels for the benefit of the citizens. However, later in *Unnikrishnan v/s. State of AP (1993) – 1 SCC 645*, the Court restricted this fundamental right up to the age of 14 years. This was in consonance with Article 45 under which the State is under an obligation to provide free and compulsory education for all children until they complete the age of 14 years.

Right to education

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[16] We will consider this when we come to Directive Principles.

If right to education is absolutely necessary for the full development of the human personality and for strengthening one's sense of dignity, what is required is "accessibility to all" by "every appropriate means" to various levels of education (See Article 13 of ICESCR and also Article 26 of UDHR). The obligation of the State is to recognise that every one has the right to "achieve the full realisation of this right" for which purpose there shall be no impediment to accessibility.

Article 25 of UDHR as we have seen above, says: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including..." More affirmatively, Article 12 of ICESCR states, "1. The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." The states have to take steps to achieve the full realisation of this right, which include:

Right to health

"(a) the provision for the reduction of the still-birth-rate and of infant mortality and for the healthy development of the child;

(b) the improvement of all aspects of environmental and industrial hygiene;

(c) the prevention, treatment and control of epidemic, endemic occupational and other diseases;

(d) the creation of conditions which would assure to all medical service and attention in the event of sickness."

Recently in the matter of *West Bengal Farm Labourer's Association v/s The Govt. of West Bengal*, the Supreme Court has upheld a patient's right to emergency medicare as a right falling within the ambit of Art. 21 of the Constitution of India. The judgement says: "In a Welfare State the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government... The Government discharges this obligation by running hospitals and health centres which provide medical care to the person seeking to avail of those facilities. Article 21 imposes an obligation on the State to safeguard the right to life

of every person. Preservation of human life is thus of paramount importance. The Government hospitals run by the State and the medical officers employed therein are duty-bound to extend medical assistance for preserving human life. Failure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21."

The Supreme Court gave various directions for the purpose of dealing with emergency patients. In other words, it declared that the patients have a fundamental right to be admitted to a public hospital in cases of emergency. The Supreme Court further said that financial stringency of the State exchequer is not a valid plea when the question is one of giving medical aid to preserve a human life.[17]

Right to health does not mean right to treatment only. It includes all aspects of health and hygiene. In particular, it includes all aspects of environmental and industrial hygiene. Thus, we now have large number of cases dealing with environmental law—particularly in cases of industrial corporations causing pollution problems in the neighbourhood, producing and selling products which are hazardous to health, and compelling workmen to work in conditions not suitable to their age or strength. All these have been considered as violations of Article 21. The State has an obligation to ensure the creation and the sustaining of conditions congenial to good health.

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[17] The Supreme Court said: "Not only the government hospital, but the medical officers employed therein are also liable to a charge of violating fundamental right, if they deny such admission."

Lecture VIII

Right to Life and Liberty — Continued

Article 1 of UDHR says: "All human beings are born free and equal in dignity and rights..." Naturally each human being endowed with reason and conscience is entitled to his free self-assertion which includes physical, mental and economic activities. Liberty of a person, therefore, consists in doing what he desires subject to such social control as may be necessary to balance the exercise of similar desires by other people in the society. In the United States' Constitution, the expression "liberty" is contained in the Vth and XIVth Amendments. The expression "liberty" has been interpreted to include practically all the fundamental rights, such as freedom of speech, freedom of press, freedom of religion, freedom of assembly, freedom of movement and residence, freedom of profession, business or calling, welfare of the community including its political well-being. In India we have certain fundamental freedoms guaranteed u/Art. 19(1)(a) to (g). "Liberty" under Art.21 is considered as a wider concept, and it is used as a compendious term to include within itself all the varieties of rights which go to make up the "personal rights". Though there is overlapping of some of the aspects as between Articles 19 and 21, the wider concept of "Liberty" has made it possible to bring several violations of human rights within the scope of Article 21.

Meaning of liberty

Under Article 13(2) of the Universal Declaration of Human Rights, everyone "has the right to leave any country, including his own, and to return to his country." Article 12 of ICCPR elaborates this and says that "the above-mentioned rights shall not be subject to any restriction except those which are provided by law, are necessary to protect national security, public order, public health, or morals or the rights and freedoms of others and are consistent with the other rights recognised in the present covenant." This was recognised by the Supreme Court in the case of *Satwant Singh v/s Asst. Passport Commissioner (AIR 1967 SC 1836)* and held that no person could be deprived of his right to travel abroad except according to procedure established by law. This was reiterated in *Maneka Gandhi v/s Union of India (AIR 1978 SC 597)* wherein it went a step further and stated that the procedure must be just, fair, and reasonable.[18]

Liberty includes travel abroad

In the United States, speedy trial is one of the constitutionally guaranteed rights. The VIth Amendment of the Constitution says: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." In a series of cases[19], the Supreme Court held that speedy trial was an integral and essential part of the fundamental right to life and liberty under Article 21. It elaborated and pointed out that expeditious review of withdrawal of cases, investigation of cases within a time-bound frame, delay in trial, would all fall within the concept of speedy trial. It was in *AR Antulay v/s RS Naik (AIR 1992 SC 1701)*, the Supreme Court stated that there ought to be an outer limit beyond which continuance of proceedings would be violative of Article 21. The question is, speedy means how speedy? How long a delay is too long? In Antulay's case, a period of more than seven years was considered as unreasonable. In all these cases, the test is one of fair, just and reasonable procedure having regard to the facts and circumstances of the case. Most of these cases came to be decided on the basis of the law laid down in *Maneka's* case *(Supra)*

Right to speedy trial

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[18] We will study this in greater detail, a little later when we refer to due process.

[19] *Husseinara Khatoon v/s Home Secretary* 1980 (1) SCC 81.

Under Article 9(3) of ICCPR, anyone arrested or detained on a criminal charge shall be entitled to trial within a reasonable time or to release. "It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings and, should occasion arise, for execution of the judgment." In several countries, there is no law for guaranteeing bail. If anyone is arrested, he remains in custody till the trial takes place. However, in India, we have two categories of offences—bailable and non-bailable.[20] In the case of bailable offences, the accused is entitled to bail, as a matter of right. In the case of non-bailable offences, such as murder, dacoity, causing grievous injury, theft etc. it is for the Court to grant bail or not. Even if bail is granted, it would be subject to several restrictions, such as daily reporting to the police, not to tamper the evidence, and the cooperate with the investigation etc. (S.437 CrPC). We have now a provision for anticipatory bail (S.438 CrPC). It contemplates an application to be made to the Court of Sessions or to the High Court, on apprehension of arrest in a non-bailable case, and the Court may, if it thinks fit, direct that in the event of arrest, he shall be released on bail subject to such terms and conditions as the Court may prescribe.

'Bail' or 'jail'

The question is one of Court's discretion—to grant bail or not to grant bail. More aptly, the question is one of personal liberty and to what extent the same should be deprived. In a land mark judgment (*G. Narasimhulu & Ors. v/s Public Prosecutor AP (1978) 1 SCC 240*), Justice VR Krishna Iyer said: "The issue is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitised judicial process." He said that bail is a matter of judicial discretion. But that has to be exercised reasonably. He pointed out: "All deprivation of liberty is validated by social defence and individual correction along an anti-criminal direction. Public justice is central to the whole scheme of bail law. Fleeing justice must be forbidden

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[20] See Chapter XXXIII CrPC: *Provisions as to Bail and Bonds.*

but punitive harshness should be minimised. Restorative devices to redeem the man, even through community service, meditative drill, study classes or other resources should be innovated, and playing foul with public peace by tampering with evidence, intimidating witnesses or committing offences while on judicially sanctioned 'free enterprise', should be provided against. No seeker of justice shall play confidence tricks on the Court or community. Thus, conditions may be hung around bail orders, not to cripple but to protect. Such is the holistic jurisdiction and humanistic orientation invoked by the judicial discretion correlated to the values of our Constitution." He then mentioned the relevant factors to be taken into account, such as the nature of the charge, the nature of the evidence, and the history of the accused—whether he has a bad record, for the purpose of granting or not granting bail. He said: "If public justice is to be promoted, mechanical detention should be demoted."

Rights of prisoners and under-trials

Article 5 of UDHR says: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Article 10(1) of ICCPR says: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Sub-Article (3) says: "The penitentiary system shall comprise treatment of prisoners, the essential aim of which shall be their reformation and social rehabilitation." Our penal system is largely based on retribution theory and rehabilitation is a far cry. However, the Supreme Court of India has given several judgments which can as well be termed as "Prison jurisprudence".

The fundamental proposition is that a person, on conviction, cannot be reduced to the status of "non-person". He remains a human being and his dignity survives even in a prison setting. Thus a convict cannot be kept under solitary confinement simply because he has been sentenced to death, nor can he be made to suffer degrading mode of execution of that sentence (See *Sunil Batra v/s Delhi Administration, AIR 1978 SC 1675).*[21] Even in other cases of rigorous imprisonment, hard labour should not go to the extent of unnecessary harshness. Prisoners cannot be denied the opportunity of meeting family members, friends, lawyers and even newsmen, and also facilities for reading, writing and

corresponding with the outside world should be made available.[22]

In the case of under-trial prisoners, the question is how long they should remain in custody awaiting trial. It should not be for an indefinite period or for an unduly long period. As we have seen above, speedy trial is a fundamental right within the meaning of Article 21. Under the CrPC, if a charge-sheet is not filed within ninety days of the arrest of the accused, he is entitled to be released on bail as a matter of course (See S.437(6).) However, if a charge-sheet is filed, but the trial does not take place, or the trial takes an unduly long period[23], the detention becomes violative of Article 21. If ultimately, the accused is acquitted, he gets his freedom, but there is no provision for payment of compensation for the years that he spent in detention. Under Article 9 sub-Art. (5), "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation". We are yet to provide for such a relief.

Under-trial prisoners cannot be treated harshly. The presumption of innocence continues and it is highly improper for the police to project and publicly announce that such a person deserves detention as a matter of penalty. This has led to a feeling in certain quarters that the only way to secure justice is to deny

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[21] See para 207: "... Prison laws, now in bad shape, need rehabilitation; prison staff, soaked in the Raj past, need reorientation; prison house practices, a hang-over of the die-hard retributive ethos need reconstruction, prisoners, those noiseless voiceless human heaps, cry for therapeutic technology, and prison justice, after long jurisprudential gestation, must now be reborn through judicial midwifery, if need be. No longer can the condition be curtained off from the incarcerated community since pervasive social justice is a fighting faith with Indian humanity. I hopefully, alert the nation and for the nonce, leave follow-up action to the Administration with the note that stone walls and iron bars do not ensure a people's progress... So it is that there is urgency for bridging the human gap between prison praxis and prison justice; in one sense, it is a battle of tenses and in another, an imperative of social justice."

[22] See *Sunil Batra v/s Delhi Administration AIR 1980 SC 1579.*

[23] As in the Bomb-blast case in Mumbai.

bail and that the judges give bail liberally. What is lost sight of is the fact that detention without a speedy trial is anathema to any concept of liberty and in such situations the Court has to adopt a humane approach. That is why the Courts have always condemned "third degree methods" as an affront to human dignity. See *Kishore v/s State of Rajasthan (AIR 1981 SC 625)*. Even handcuffing is an act against all norms of decency and should be resorted to only as a last resort for ensuring security (*State of Maharashtra v/s Ravikant (1991) 1 SCC 373).*[24]

Death Penalty

While the UDHR declared that everyone has the right to life, liberty and security of person, it did not specifically say that death penalty is violative of human rights. However, Art.6(2) of ICCPR considered death penalty as only a transient phenomena and said that "sentence of death may be imposed only for the most serious crimes in accordance with the law in force." It expressly said [sub-Art.(5)]: "Sentence of death shall not be imposed for crimes committed by persons below 18 years of age and shall not be carried out on pregnant women." Simultaneously it insisted [sub-Art.(6)] that "nothing in this Article shall be invoked to delay or prevent the abolition of capital punishment by any State party to the present covenant."

The Human Rights Committee set up under ICCPR continued to affirm that "the right to life is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation" and demanded abolition of death penalty all over the world. This led to the Second Optional Protocol of the ICCPR adopted by the UN General Assembly on 15th Dec, 1989 which says: "The abolition of death penalty contributes to the enhancement of human dignity and progressive development of human rights." It urged all State parties to take necessary measures to abolish death penalty "as such a measure

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[24] There are many countries where the accused is chained from hands to feet in such a way that at no time can he stand erect, irrespective of the nature of the offence. The author has seen large number of accused persons brought and kept in such condition, in the Court premises, awaiting trial, in Bangkok, Thailand.

will be considered as progress in the enjoyment of right to life."[25] Most recently, on 28th April 1999, the UN Commission on Human Rights overwhelmingly voted for a resolution that called for a global moratorium on death penalty.

In 1899, on the eve of the 20th century, only three states—Costa Rica, San Merini and Venezuela—had abolished death penalty for all crimes. When the UDHR was adopted in 1948, the number stood at eight. But by 1998, 67 countries had abolished death penalty. In about 24 countries, though death penalty is not abolished, no execution has taken place for the last 10 years. In some countries, death penalty has been abolished for women and for men over 65 years. In India, though during the last two years about 50 persons were sentenced to death, no execution has been reported.

In India, the IPC prescribes capital punishment for about six offences, like murder, waging war against the Government, dacoity with murder. Besides, we have some special laws like TADA, POTA etc. which prescribes death sentence for certain offences. Under Sections 120 B, 121 and 302 of the IPC, the discretion is given to the judge as to whether capital punishment should be awarded or life imprisonment should be given. In other cases, capital punishment is available merely as the upper limit of a full range of punitive strategies. The law as it stood before 1955 [Sec.367(5] CrPC), was that the Court should give reasons if it chose not to pass death sentence. During that time death sentence was the rule and the lesser punishment of life imprisonment could be given only for special reasons.

Section 367(5) CrPC was amended in 1955 and after that the judges were left with the discretion to give either of the sentences. The Legislature dropped that part of the sub-clause which made it necessary for the courts to State the reasons for not awarding the sentence of death.

However, now Section 354(3) of the CrPC 1973 provides that in all cases of murder, life imprisonment should be given unless there are special reasons for passing the sentence of death. It

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[25] For the full text see the Annexure.

means that the extreme penalty of death sentence could be awarded in exceptional cases.

How do we determine exceptional cases? Where do we draw the line? The criteria for awarding life sentence when death sentence was the rule and life sentence was the exception, fundamentally differs from a situation where life sentence is the rule and death sentence is the exception. In the former situation, the crime having been established whatever be the manner of committing the crime, the Court would take into account the factors that relate to the criminal – the man – his general background, his age, his family members and their dependence on him, his general behaviour towards society etc. On the other hand, when life sentence is the rule and death penalty the exception, the criminal – the man – becomes irrelevant and the crime, the gravity of the crime becomes more important. In the former case, the Court could be legitimately induced to invoke its human approach, whereas in the latter case, the Court would regressively tread into inhuman situation where life would be taken away. That is the crux of the problem—the only genuine solution being to eliminate death penalty altogether.

The Supreme Court, in its anxiety to circumscribe the parameters for imposing death penalty, came with the solution of "rarest of rare cases" where death penalty could be awarded. (*Bachansingh v/s. State of Punjab AIR 1980 SC 89*). The very concept shows that the case—the rarest case—the crime becomes more important than the criminal—the man.

'Rarest of rare cases'

Repeatedly, the Supreme Court has stressed that the manner of commission of murder is an important factor. Whether murder is committed in an "extremely brutal, grotesque, diabolical, revolting or dastardly manner" so as to rouse extreme indignity of the community? Whether the motive indicates "extreme depravity and meanness...?" Whether the crime is anti-social or can be considered as socially abhorrent in its nature? Whether the crime has aroused "social wrath"? What is the magnitude of the crime—such as multiple murders or murder of all the members of a family? What is the personality of the

victim of murder? Is he/she a public figure—such as Indira Gandhi or Rajiv Gandhi—etc.?

It is difficult to appreciate whether these could be considered as proper guidelines for imposing death penalty. The facts and circumstances surrounding the incident may be relevant for determining whether a crime has been committed or not. How would they be relevant for prescribing any sentence? If the victim is killed with one gun-shot, or ten bullet wounds or any number of stabbings by a sharp knife, the offence is still murder and the offence does not change by the manner with which it is committed. Whatever the motive—anti-social, or socially abhorrent, or extremely mean, etc.—it is relevant for establishing the crime, and not for punishment. Every murder invites condemnation by the society, the reaction of each individual varying from person to person. That is why such an act has been defined as an offence. How can the social reaction be a criterion for imposing death penalty. Again, murder is murder, whether the victim is a poor, hapless slum dweller or the Prime Minister of the country. Can the sentence vary from victim to victim? In other words, the criterion of "rarest of rare cases" is so mixed up with irrelevant considerations that it has not resulted in any satisfactory solution at all.

In *Ediga Annamma v/s State of AP (AIR 1974 SC 799)*, Justice VR Krishna Iyer commented: "A legal policy on life or death cannot be left to ad-hoc mood or individual predeliction." The judges recommended death penalty. Justice PN Bhagwati was the only judge who took the view that death penalty was *ultra vires* Art.14 and 21 of the Constitution "since it does not provide any legislative guidelines as to when life should be permitted to be extinguished by imposition of death penalty." (In Bachansingh's Case—dissenting).

It cannot be said that capital punishment has any deterrent effect. Nor can it be considered as a preventive measure. The only reason for retaining capital punishment is based on a retributive rule of "a tooth for a tooth and an eye for an eye" and that the punishment must in some way match or be

equivalent to the wickedness of his offence. In the land of Buddha and Gandhi, it would be highly immoral to do so. Infliction of death penalty is as inhuman and cruel in nature as the offence itself.[26]

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[26] (a) Lord Denning (*The Family Story*): He was in favour of death sentence—he gave evidence before the Royal Commission. Afterwards, he changed his mind: "It is not a legal question. It is a question of policy. It is an ethical question. Is it true that we, as a society, should do a thing—hang a man—which none of us individually would be prepared to do, or even to witness. On such grounds I changed my mind. Parl was right to abolish capital punishment. It was right to abolish flogging. Those days are past.

(b) "I have full sympathy for the families of the victims of murder and other crimes, but I do not accept that one death justifies another"—Mary Robinson, UN High Commissioner for Human Rights.

LECTURE IX

Right to Life and Liberty — Continued

Due process

The requirement of "procedure established by law" for deprivation of any one's life or liberty is primarily for the purpose of safeguarding against arbitrary action on the part of the State. In other words, there should be a law in which there should be a procedure and the State can deprive any one's life or liberty, only in accordance with such procedure as prescribed by law. The idea is that the State can not act arbitrarily. Article 39 of the Magna Carta (1215 AD) of England says; "No man shall be taken or imprisoned, disseised or outlawed, or exiled, or in any way destroyed, save by the lawful judgement of his peers or by the law of the land". In the Petition of Right presented to Charles 1 in 1628, there is this prayer: "That freedom be imprisoned only by the law of the land or by due process of law, and not by the King's special command, without any charge". But English people did not make any distinction between "authority of law" or "due process of law" and they used both the expressions in the same sense, and their prayer was that the King should not act contrary to existing law. In other words, executive powers not be exercised arbitrarily. We find similar expressions in Article 6(1) of ICCPR which deals with Right to life, and it says; this right shall be protected by law. No one shall be arbitrarily deprived of his life"

'Procedure established by law'

So also Article 9(1) of ICCPR which deals with the right to liberty and says: "No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

The words "determined by law", "prescribed by law", "established by law" or "provided by law" are to be construed in accordance with the laws of the State. However, that law and its application must not be such as to be contrary to the purpose and spirit of the concerned human right which requires to be protected. In other words, the law must be just and states cannot be allowed to impair the guarantees provided in human right covenants. Article 30 of the UDHR and Article 5, paragraph 1 of both the covenants provide that:

"Nothing in this declaration (in the present Covenant) may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein (or at their limitation to a greater extent than is provided for in the present Covenant)."

This fundamental provision is designed to safeguard the rights protected by the UDHR and secured by the covenants by protecting the free operations of democratic institutions.

"The scope and purpose of this provision are to limit the rights guaranteed only to the extent that such limitation is necessary to prevent their total subversion, and must be narrowly interpreted in relation to this object."[27]

The term "due process of law" is a product of English law. In England, it had no distinct meaning other than "law of the land." It was either the common law or the law made by the Parliament If an action is in accordance with law, it stands justified in a court of law. Later, even as administrative law came to be developed by the courts in England, it still centred on judicial review of official action, but within the law. Even where the decision was within the four corners of statutory power, judges would intervene when that power was unreasonably exercised. As the laws conferred greater

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[27] See *UN Study Series* 3; Freedom of the individual under law, Pg 129.

discretionary powers on the officials and the ministers, the judges in turn expanded the concept of judicial review on the touchstone "of fair", "reasonable" and "just" exercise of that power.

The most important word in the term "due process of law" is the word "due". It is not any "process of law," but "due" process of law that can justify deprivation of life and liberty. In England the process would be considered as "due" if it is in accordance with law. But if the law itself is unjust, Court would not strike down the process on the ground that it was not "due." However in the United States such a law would be struck down on the basis that it was not in accordance with "due process of law." In other words, it is not only a limitation against the Executive, but also regarded as a limitation against the Legislature as well. As we have seen earlier, when by the first Ten Amendments, fundamental rights, were introduced in the American Constitution, there were no restrictions on such rights [unlike our Constitution—Articles 19 (2), to (6)] and the Supreme Court in interpreting the Constitution had to invent the doctrine of "police power" of the State. This enabled the states to impose such restrictions upon the exercise of the fundamental rights, as are necessary to protect the common good, such as public health, safety, morals etc. At the same time because of the guarantee of "due process" in the Vth and XIVth Amendments, the Police Power of the State must be exercised subject to the constitutional limitation including "due process". Thus the Court would strike down any law which it considered "arbitrary" or "unfair", or "opposed to the fundamental principles of liberty and justice" as violative of "due process" and as such is void. Thus the term "due process of law" is essentially a control over the plenary powers of the legislature. Even where a legislation is in the exercise of Police Power it is still subject to judicial review based on criterion of reasonableness. It must also be mentioned that the American Supreme Court has gradually evolved its procedural aspect as well as substantive aspect. If the procedure under any law which seeks to deprive

liberty is arbitrary, such a procedure would be considered as violative of "procedural due process." However, in certain cases, the law itself could be unreasonable or unjust, and the court in such a case would declare the law as violative of "substantive due process".[28]

When we drafted the Constitution, we had expressly rejected the term "due process of law". One of the first cases to be determined by the Supreme Court was *AK Gopalan v/s State of Madras* (AIR 1950 S C 27). AK Gopalan, a communist leader, had been detained under free India's first preventive law, the Preventive Detention Act providing, for preventive detention as provided under Article 22(4) to (7) of the Constitution of India. He challenged his detention on the ground that it was ultra vires Article 21, inasmuch as it did not provide for a "just" law, in that it did not include provisions for notice, opportunity to be heard, impartial tribunal and orderly course of procedure. All these Contentions were negatived by four judges out of a bench of five judges. Fazl Ali, J. was the only judge who accepted these arguments. The majority judges took into account the Constituent Assembly debates which had resulted in the rejection of "due process", and also the doctrine of judicial supremacy. As regards the "procedure established", they said that it would only mean "fixed" or "laid down" or "exacted by law". In

AK Gopalan's case

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[28] It is interesting to see how S. Africa has included almost all human rights which are in ICCPR and also in ICESCR, in absolute terms and then provided for a general limitation covering all human rights: Art. 36:

(1) The rights in the Bill of Rights may be limited only in terms of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including
a. the nature of the right;
b. the importance of the purpose of the limitation;
c. the nature and extent of the limitation;
d. the relation between the limitation and its purpose; and
e. less restrictive means to achieve the purpose.
Except as provided in sub-section (1) or in any other provisions of the Constitution, no law may limit any right entrenched in the Bill of Rights.

other words, the Court would accept the English principle of "due process" which recognised the supremacy of Parliament, rather than the American principle where judiciary would revise the law. They had also taken the view that Article 21 has nothing to do with Article 19 or Article 14 and they need not be read together. This was the legal position for more than two decades till *Maneka Gandhi* came to be decided.

There are two or three basic questions which *AK Gopalan* did not appreciate. The term "procedure established by law" was conceived essentially as a term of limitation on the exercise of arbitrary power of the State to deprive life and liberty. An exercise of power by the State could be "arbitrary"—almost "tyrannical"—and yet could be "lawful." If we are only concerned with the question whether an act is "legal" or "illegal", all oppressive acts of the State would be unassailable so long as they were in accordance with the laws. In that event the State would ultimately be able to avoid all its obligations to guarantee human rights. So also the word "arbitrary" cannot be confined only to acts which are illegal. It is more appropriate to consider such acts as "unjust", whether legal or illegal. Therefore, it becomes necessary to subject the "laws" of any Government, to norms of justice. An unjust law cannot justify any act which is arbitrary. The other question which the court did not consider was that all human rights are indivisible and are inter-connected. Take away any one human right, it is bound to affect other human rights. It is therefore necessary that all human rights should be read together and not each one of them in isolation.

The first change of approach came in the *Bank Nationalisation Case* [*RC Cooper V/s Union of India* (1970) 2 SCC 298]. In this case the Supreme Court overruled the theory in *AK Gopalan's case* that freedoms under Articles 19, 21, 22 and 31 are mutually exclusive, and said: "Part III of the Constitution weaves a pattern of guarantees on the texture of basic human rights. The guarantees delimit the protection of those rights in their allotted fields; they do not attempt to enunciate distinct rights." Thus in *Maneka Gandhi's Case*, the Supreme Court could read the different rights

Maneka Gandhi's case

together.[29] The Court said that if a person's fundamental right under Art. 21 is infringed, the State can rely on a law to sustain the action, but that cannot be a complete answer unless the said law satisfied the test laid down in Article 19 (2). In other words, the law has to be reasonable. Having come to the conclusion that Article 21 should be read with Article 19, the Supreme Court went a step further by taking into account Article 14, the right to equality. They referred to *EP Royappa V/s State of Tamil Nadu* [AIR (1974) 4 SC 555] wherein it was stated that equality is antithetic to arbitrariness. The Court had said: "...equality and arbitrariness are sworn enemies. One belongs to the rule of law in a Republic, while the other to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit that it is unequal both according to political logic and constitutional law and is therefore violative of Art.14. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness which legally as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it will be no procedure at all and the requirement of Art.21 would not be satisfied."

In other words, "procedure" in Article 21 means fair, just, not formal procedure. "Law" should be a reasonable law, not any enacted piece. The law should meet the requirements of "reasonable restrictions" in terms of exceptions to fundamental freedoms guaranteed under

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[29] See *Maneka Gandhi v/s Union of India* (1978) 1 SCC 248, a bench of seven Judges, the decision being by a majority of 6 to 1. This was a case of impounding the passport of Maneka Gandhi, the petitioner. When she asked for reasons for impounding the pass-port, the Government of India only said that it was done in the "interest of the general public" and declined to give reasons.

Art.19(1)(a) to (g), read with Sub- Art.(2) to (6). It must also stand the scrutiny of Article 14. Though we studiously avoided "due process of law" while framing the Constitution, it is now, since *Maneka Gandhi*, very much an essential part of our constitutional jurisprudence.

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Lecture X

Fair Trial Principles and Laws like TADA, POTA, MCOCA

The right to fair trial is a human right. Articles 9 and 10 of the UDHR guarantee the right to a fair trial which will protect individuals from the unlawful and arbitrary curtailment or deprivation of life and liberty. Art. 9 says: "No one shall be subjected to arbitrary arrest, detention or exile." Art. 10 says: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." More explicitly, Art.14 of the ICCPR says: "Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

Right to fair trial

The most important Covenant, as far as we are concerned, is the ICCPR which contains several relevant Articles in assessing the fairness of trial.[30]

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[30] There are several other international documents, which though not formally binding, can be taken to express the direction in which the law is evolving: eg, (1) Basic principles for the treatment of prisoners. (2) Code of conduct for law enforcement officials. (3) Guidelines on the role of prosecutors. (4) Body of principles for the protection of all persons under any form of detention or imprisonment. (5) Basic principles on the independence of judiciary. (6) Basic principles on the use of force and firearms by law enforcement officials. (7) Guidelines on the administration of juvenile justice etc.

Art. 9 (1) says: "Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." The key words are: "liberty", "security", "arbitrary arrest" "on such grounds", and "in accordance with such procedure as are established by law". We have dealt with these concepts in the preceding lectures.

Procedural safegaurds

Articles 9 (2) to (5) of ICCPR provide for procedural standards against arbitrary arrest. Art. 9(2) says: "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." Art. 9(3) provides that such a person should be brought "promptly" before a judge. Art. 9(4) says that if the arrest or detention is unlawful, the Court shall order his release. Besides the provisions relating to grant of bail, the constitutions of many countries provide for issue writs of Habeas Corpus by the superior courts for release in the case of unlawful, unjust detention of any person. These are all in our Constitution as also in the CrPC. Art. 9(5) says: "Anyone who has been victim of unlawful arrest or detention shall have an enforceable right to compensation." It is not enough if the victim is released, he has to be compensated for the liberty that he lost. It is now a well accepted proposition in most of the jurisdictions that monetary or pecuniary compensation is considered as an effective remedy for redressal of the infringement of his right to liberty.

We have large number of under-trial prisoners, kept in custody for years together awaiting trial. However, when they are acquitted and released, they are as good as destitute. Under the law, there is no provision for compensation. But in cases of unlawful detention, the Supreme Court and the high courts in recent years have granted compensation. In one case, the petitioner was detained for 14 long years after his acquittal, due to administrative lapses, and the Supreme Court granted him compensation of Rs. 35,000 with further liberty to file a regular suit.[31] The Supreme

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[31] *Rudul Shah v/s State of Bihar* (AIR 1983 SC 1086).

Court observed: "Article 21, which guarantees the "right to life and personal liberty" will be denuded of its significant content if the power of this Court were limited to passing orders of release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with mandate of Art.21 secured is to mulct its violators in the payment of monetary compensation....." Now there are a number of cases where the courts have granted compensation in cases of unlawful detentions, police encounters and custodial deaths. In many cases, national and state human rights commissions have also granted such compensation to victims of police violence and unlawful arrests. However, we do not have any case where a person is paid compensation for wrongful conviction and being forced to live behind bars when the State later on realises that there was no justification for such conviction.

Right not to be tortured

Art. 7 of ICCPR says: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Art. 10 (1) of ICCPR says: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Reading the two together, it becomes clear that an arrested person shall not be denied food, clothing, medical attention, communication with their near and dear ones, etc. It means that he has a right to be treated with human dignity. It also means that he cannot be subjected to torture for the purpose of extracting confessions. One of the basic principles, as we have seen earlier[32], is that no one shall be compelled to be a witness against himself. That is why a statement made by an accused person to a police official is not considered as admissible piece of evidence at all. It is the universal experience of all of us that police officers do resort to inhuman, barbaric, archaic and drastic methods to extract confessions. Even otherwise there cannot be any free atmosphere to make any voluntary statement within the police lock-up.

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[32] See Lecture VI.

The right not to be tortured is a non-derogable right. Art. 4(1) of ICCPR provides for states derogating from their obligations in times of public emergency "which threatens the life of the nation," to the extent "strictly required by the exigencies of the situation." However sub-Art.(2) makes some of the Articles non-derogable, which includes Art.7 (supra). In other words, "torture" or "cruel, inhuman or degrading treatment or punishment" can never be permitted even in times of public emergency whatever the exigencies of the situation. Therefore if there is any law permitting the police to extract confessions from any person under arrest or detention, it will inevitably result in torture or cruel treatment. The law then becomes unjust and unfair and can never be considered as reasonable.[33]

Minimum requirements

While the above are some of the general principles relating to arrest, investigation and collection of evidence before any trial begins, the following are the particular provisions relating to a fair trial. Art. 14 of ICCPR sets out the minimum requirements of any fair trial in a criminal case.

Right to public hearing

Art. 14(1) says, "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him... everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law..." The key words are "a fair and public hearing" by "a competent independent and impartial tribunal." The general rule is that the court is open to all and all deliberations of the court shall be conducted in public. All evidence shall be tendered in public, witnesses shall be examined and cross-examined in public, arguments shall be heard in public and judgements shall be delivered in public. Exceptions to this general rule would be only in such circumstances as "publicity would prejudice the interests of justice." Our CrPC also provides for recording or receiving evidence in the presence of the accused.[34]

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[33] After 44th Amendment of our Constitution, even during times of emergencies, Art. 20,and 21 cannot be suspended.

[34] S.273 CrPC.

The tribunal has to be independent and impartial, and should be seen to be so. It means that the court cannot be guided by any secret instructions or any other guidelines issued by the executive authorities in relation to any trial. The reason for these provisions is to avoid arbitrariness or bias that would potentially arise if criminal charges were to be decided by an executive authority or a political body. Moreover the word "competent" indicates the appointment of judges in accordance with appropriate rules based on merit and not at the personal whim or fancy of any administrative agency.

Art. 14 (2) says: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." It means that the burden of proof is on the prosecution. The guilt must be proved beyond reasonable doubt and the benefit of doubt goes to the accused. The presumption of innocence remains throughout from the time a person is charged with an offence till the case is proved beyond reasonable doubt. Thus it is not open to the police to presume that the person arrested is guilty of the offence charged.

Presumption of innocence

Art. 14(3) (a) to (g) provide for certain minimum guarantees "in full equality." Clause (a) provides that the accused "be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him." The accused has to be given all the material which will be used against him before the trial commences. This must be given in a language that he understands. Same is the position under our CrPC (S.207 & 208).

Minimum guarantees

Clause (b) provides for adequate time and facilities for the preparation of the defence and to communicate with his counsel. The right to communicate with the counsel is the most important guarantee for a fair trial. Under S. 304 CrPC if the Court of Session finds that the accused is not represented by a pleader because of lack of sufficient means to engage one, it shall assign a pleader for his defence, at the expense of the State. This is generally done by selecting an advocate from a panel of advocates prepared by the court. This is done as a

matter of course, and the accused has no choice in the selection of the advocate. It is still not realised that legal aid to poor or indigent accused is a constitutional imperative mandated not only by Art. 39-A but also by Art. 14 & 21 of the Constitution.[35]

Clause (c) provides for trial without undue delay. The Indian Supreme Court has pronounced that right to speedy trial is a fundamental right.

Clause (d) provides for the right to tried in one's presence and to defend oneself in person or through legal assistance... No case can be tried behind the back of an accused person. He has the right to be informed of the right to counsel and to receive free legal aid, if need be.

Clause (e) gives the right to "examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf..." It means the prosecution must give the names and particulars of the witnesses well in advance to the accused to enable him or his counsel to cross-examine them. Not disclosing the identity of witnesses and examining witnesses in the absence of both the accused and counsel is often considered as unfair.

Clause (f) provides for the right to an interpreter, if the accused cannot understand or speak the language used in court.

Clause (g) guarantees the right "not to be compelled to testify against himself or to confess guilt." This is also provided under Art. 20(3) of our Constitution.[36] It means that there cannot be any coercion to confess at the time of investigation, or to testify against himself or confess guilt at the time of any trial. It means the accused has a right to remain silent, and silence may not be used as evidence to prove his guilt. While this is the law under our CrPC

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[35] (1) *Sheela Barse v/s State of Maharashtra.* AIR1983 SC 378.

(2) See also *Hussainara v/s State of Bihar* AIR 1979 SC1369. In USA, the VIth Amendment guarantees that in all criminal prosecutions the accused has a right to assistance of counsel for his defence. This is also considered as part of "due process".

[36] See Lecture VI.

it also provides that in any inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court u/s 313 CrPC, may put such questions to him as the court considers necessary. The accused is not bound to answer, but if he makes any statement, the court may take the same into consideration. In any case, no oath is administered to the accused under this provision. This statement is recorded, after the prosecution completes its evidence and before the accused is called on his defence. After this stage is over, the accused may examine any witness, including himself. However, he shall not be called as a witness except on his own request in writing; but his failure to examine himself shall not be commented upon nor would that give rise to any presumption against him or anyone charged together with him at the same trial[37]

Art. 14(5) provides for the right of appeal to a higher tribunal. On such appeal being entertained all the guarantees of a fair trial must be observed during the entire proceedings. In other words, the presumption of innocence would also continue till the appeal is decided one way or the other.

Art. 14(6) says that if the conviction of an accused is reversed and if it is found that there has been a miscarriage of justice, he has a right to be compensated.

Art. 14(7) provides for prohibition against double jeopardy, which we have seen earlier.[38] It means the investigating agency must collect all available evidence and make up its mind to commence the trial at a certain stage. Once the trial begins there is no half way to withdraw from trial and investigate again to prosecute for a second time.

Art. 15 (1) contains the principle that there can be no retroactive criminal law which we have seen earlier. [Art. 20(1) of the Constitution].

Thus as we compare, we find most of the fair –trial principles are present in our CrPC. The right to fair-trial is also guaranteed under our Constitution, particularly as enunciated in

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[37] S. 315 CrPC.

[38] See Lecture VI..

the interpretation of right to liberty under Art. 21. However, inspite of our incorporation of various human rights in the form of Fundamental Rights under Part III of the Constitution, we felt compelled to incorporate certain provisions by way of preventive detention measures in the very part relating to fundamental rights. In the CrPC, there is the provision of S. 151 which enables a police officer to arrest any person on the mere pretext that that person is likely to commit a cognisable offence. The only safeguard is that he cannot be detained for more than 24 hours without authorisation by the Magistrate It is this provision that is commonly used to detain persons whenever there is any protest against the Government At times this can be very oppressive as against a poor man whenever he raises his voice against the Government. While this provision can be considered, *prima-facie*, as violative of Art. 21, we have incorporated Articles 22 (3) to (7) providing for a longer period of detention.

Preventive Detention

Preventive detention is detention without trial, and is violative of international human rights' standard. It is "arbitrary". However, we felt at the time of drafting the Constitution that such a provision would be required for a short duration, having regard to the condition prevailing at the time we got Independence. At the same time we provided for certain safeguards. While liberty cannot be taken away without a law, the law providing for preventive detention should provide, *inter-alia*: (a) that the detenu should be given the grounds of detention with reasons in support of the same, (b) that he should be given an opportunity to make representations against his detention, (c) his case should be referred to an Advisory Board, consisting of a sitting judge and two retired judges, (d) the Advisory Board after going through the papers and after hearing the detenu will decide whether in its opinion, there is sufficient cause for detention, and if the opinion is in the negative, the detenu shall be released forthwith, and (e) that in any case he shall not be detained for more than six months. This itself is not a satisfactory position, as in many cases the detention orders are set aside by the High Court on the basis of bias or malice and otherwise unjust. Unfortunately, we are now enacting such laws

which are in essence detention laws, yet they are outside the scope of the above safeguards only because the accused is charged with an offence to be tried in course of time. Very often the trial does not take place for years, but the accused remains in custody only because the law debars the court from granting bail.

'TADA'

One such law was the Terrorist and Disruptive Activities (Prevention) Act, 1985 —TADA. In May 1985, a series of bombs, some of them transistor bombs, exploded in Delhi and other places. That was the reason for the introduction of TADA. Initially the law was enacted for a period of two years. Thereafter it was renewed from time to time till 1995. The Act was also extended to different states, so much so, that when the law lapsed it was in force in 22 out of 25 states and 2 out of 7 Union Territories.[39] This law was misused on a large scale. Within a decade over 77,571 persons were arrested and detained for years together. Out of these about 72,000 were just let off without a trial because there was no evidence against them. Even where the accused were tried the conviction was only in about 1.8% of the cases.[40] Amongst the persons arrested, there were advocates, cabinet ministers, civil servants, legislators, civil libertarians, people from the film-world, media personnel, students, writers, artists and several others including a retired High Court judge.[41]

The worst features of the Act were the following: The definition of terrorist acts (S.3) and disruptive activities (S.4) was wide enough to cover a wide range of activities, private or public, violent or non-violent. Disruptive activity included "any action taken, whether by act or speech, or through any other media or in any manner whatsoever, which questions... whether directly or indirectly, the sovereignty and territorial integrity

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[39] The exceptions were Kerala, Orissa, Sikkim, Andaman and Nicobar, Dadra and Nagar Haveli, Lakshadweep and Pondicherry.

[40] The maximum number of arrests were in Gujarat and not in Punjab or Kashmir, the figures being, Gujarat, 18686, Punjab 15314, and Jammu & Kashmir 11616.

[41] Justice Ajit Singh Bains from the Punjab & Haryana High Court.

of India, or which is intended to bring about or supports any claim, whether directly or indirectly, for the cession of any part of India or the secession of any part of India from the Union". [S.4(2)]. And the act could be anything which "advocates, advises, suggests or incites, or predicts, prophesies or pronounces or otherwise expresses" and all these could be disruptive activities [S.4(3)]. Penal offences under the provision of other Acts could be included if they were committed in aid of terrorist and disruptive activities. If any one was found with a lethal weapon in any notified area he could be presumed to be a terrorist [S.5.] The trial procedure in all such cases was different and the punishments were enhanced. The police had the discretion to pick and choose and charge either under the ordinary law or under TADA. In the latter case the accused would get a different treatment.

The normal safeguard of being produced before a judicial magistrate within 24 hours of arrest was modified in TADA cases. The accused could be produced before an executive magistrate [S.20(4)(a)][42]. The remand period, which is usually not more than 90 days, could be extended upto one year.[S.20(4)(b)]. Bail as a rule was not permissible under TADA. To grant bail the court needed to satisfy itself that there were reasonable grounds to believe that the accused was not guilty and that he was not likely to commit any offence while on bail [S.20(8)]. The law also enabled the police to extract confessions which could be used not only against him but also against the other accused. [S.15 & 20(3)].

The Central or state governments could constitute a 'Designated Court' exclusively for TADA cases. The Designated Court could choose its place of sitting. All proceedings before the court were to be conducted in camera and the public had no right of access. [S.16(1)]. The identity of the witnesses could be kept secret [S.16(2)]. The next court of appeal after the Designated Court was not the High Court but the Supreme Court [S.19] Thus for every order, if aggrieved, one had to move the Supreme Court.

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[42] In Bombay some of the police inspectors are also executive magistrates.

Finally a unique feature of TADA was that the prosecution under the Act continues even after the Act has lapsed. In other words, TADA continues even after TADA is declared dead.[43]

Thus, as we see it, TADA, it was an irrational law. Mere expression of an opinion without any act of violence was termed "disruptive" by the Act and anyone could be arrested simply for holding a different opinion. It was essentially a law to silence the people from dissent and debate. That is how many human rights' defenders and social activists were arrested. If arrested, no bail could be given, yet there was no guarantee of an early trial. In that sense, it was detention without trial and with no safeguards applicable, as provided under preventive detention provisions: Art. 22 (3) to (7) of the Constitution. It permitted extraction of confession from the accused which is generally done by means of torture. TADA violated all international standards of human rights set by the UDHR and also the ICCPR. Above all, such a law can never be justified after *Maneka Gandhi*'s case. Yet, the Supreme Court upheld this law in the case of *Kartarsingh v/s State of Punjab.*(AIR 1993 SC 341).

'Unjust law'

Justice Pandian who led the majority verdict, sustained the law on the basis that it was necessary to strengthen "vigilance against the spurt in the illegal criminal activities of the militants and terrorists.", and that such a law was required for the "survival of legal order." But he failed to take into account the harm it has done to large number of innocent persons, and how irrational and unjust the law was. He realised that the provision which permitted recording of confession by the police could be misused. So, instead of striking down the law, he sought to lay down certain guidelines, such as (a) the confession should be recorded by an officer not lower than the rank of the police superintendent; (b) it should be recorded in a free atmosphere; (c) the accused should be given a statutory warning that he is not bound to make a confession; and (d) the statement should be sent to the

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[43] That is how the Bomb-blast case in Bombay continues even now under the same procedure as before it lapsed.

magistrate without delay, etc. Needless to say, these guidelines are illusory and farcical.

Despite the law being held valid, the Parliament did not renew it in 1995 because it was universally felt that TADA had been misused. There were protests all over and even the National Human Rights Commission came out openly against the law. A law like TADA would never have contained terrorists. It had only made the State more autocratic. However, thereafter, an attempt was made through a Criminal Law Amendment Bill containing all the features of TADA to be incorporated in the CrPC itself. That did not succeed.

Taking advantage of the Supreme Court verdict in *Kartarsingh*, some of the states thought of reviving laws similar to TADA. In 1999, when there was an incident of bomb-blast in Coimbatore, the state of Tamil Nadu brought a Bill known as Prevention of Terrorist Activities Act (POTA) with all the features of TADA. Fortunately, after some months the Bill was dropped. This was followed by the Maharashtra Control of Organised Crime Act, 1999 (MCOCA) allegedly introduced for apprehending "organised crime syndicates". It has all the worst features of TADA plus some more which can be conveniently applied to anyone the police choose. MCOCA has since then become a model for many Governments such as Andhra Pradesh, Karnataka and Delhi. It is a sad reflection on all these Governments to think that only a draconian law "can protect the survival and integrity of a legal order", it only betrays their faith in the Rule of Law.

'MCOCA'

Now, after the 11th September 2001 attack on the World Trade Centre in New York, the Union Government got an opportunity to bring in another law like TADA—Prevention of Terrorism Act (POTA)—enacted inspite of widespread protests from all civil libertarians and human rights defenders. POTA has all the worst features of TADA, with minor modifications based on *Kartarsingh*'s Case. "Terrorism" has not been defined under the Act; only certain "Terrorist Acts" have been mentioned, all of which are even otherwise offences under various existing statutes. So the police can pick and choose as to who should be charged under POTA and who should be charged under the

'POTA'

ordinary law. If anyone is charged under POTA, there is no bail, confessions can be extracted, the names of witnesses can be withheld, trials can be held in camera, and the punishment could be severe. All these are violative of various provisions of ICCPR and in any case cannot stand the scrutiny of the test of due process as laid down in *Maneka Gandhi*'s case. Under the Act the Government has notified about 20 organisations as "terrorist organisations". Such a notification declaring these organisations as unlawful, without observing principles of natural justice, itself is *ultra vires* under Article 14.[44]

What is worse is by notifying such organisations as "Terrorist Organisations", its members become criminals overnight without their committing any overt act. This is contrary to Art. 19(1) (a) and (c), of our Constitution, and also violative of Art. 22 of the ICCPR. The law says that any one "arranging, managing, or assisting in arranging or managing" a meeting where a member of a "terrorist organisation" is speaking, commits an offence under POTA. Besides the "meeting" could consist of three people "whether or not the public are admitted", which would mean anyone can be held under this provision even if the "meeting" could be for a peaceful purpose, in a private place.

TADA, POTA or MCOCA are all essentially detention laws. There can be no justification for them. All these laws deny bail and provide for confession. This has increasingly led to "torture". We have signed the Convention Against Torture, though not ratified it. But under the ICCPR, Art. 7, "no one shall be subjected to torture or cruel, inhuman or degrading treatment." This is one of the non-derogable rights even during times of emergency. Terrorism cannot be eliminated by any law—much less by any harsh law.[45]

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[44] *Madras v/s VG Row* (AIR 1952 SC 196).

[45] After the 11/9 incident, many governments have brought various legislative measures, which have certain common features: (a) suspension of judicial guarantees, (b) curtailment of fair-trial principles, (c) vague definition of terrorism with wide powers for the officials, & (d) targeting of foreign nationals and the minority community members.

LECTURE XI

Social and Economic Rights and Directive Principles of State Policy

All social and economic rights which are in the UDHR or in the ICESCR are human rights. In the preamble to the ICESCR it is mentioned that these rights are based on the "recognition of the inherent dignity" of the human person, which is the "foundation of freedom, justice, and peace" in the world. It is further stated in the preamble that the "ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created where everyone may enjoy his economic and social and cultural rights." As we have seen earlier, all human rights are interdependent–you take away one, you take away the others. Deny food, deny livelihood, deny shelter and you deny liberty, freedom, and ultimately the right to life and all that goes with life. It is in this context that one has to understand the significance of Article 2 of the ICESCR, which is as follows:

Social and economic rights are human rights

"1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

"2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

"3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals."

The key words are "to take steps", "individually and through international cooperation" "to the maximum of its available resources", "Achieving progressively the full realisation of the rights" and "by all appropriate means... (including) the adoption of legislative measures".[46] While all the States Parties have an obligation to respect, protect, and fulfil all human rights, the method and the manner in which obligations are to be discharged have been set out in the above Article. Whenever the State is called upon to explain how it has dealt with these social and economic rights, it has an obligation to demonstrate what "steps" it has taken, and in what manner, and with what "resources" and with what "means". It has to show that it has made use of all its available resources including international assistance and that it has adopted all appropriate means to fulfil these rights to its people. This covenant is of great importance, particularly in the context of large parts of the world where people are denied the basic needs—such as food, water, shelter, health protection and education.

Article 37: 'Fundamental in the governance'

As we had seen earlier, we incorporated some of the social and economic rights in Part IV, Directive Principles of State Policy. Article 37 in Part IV says that they are not "enforceable by any court, but principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." While fundamental rights are rights against the State or the Government,

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[46] Note the contrast in the language used in Art. 2 of the ICCPR.

the Government has a fundamental duty to fulfil such human rights as are included in the Directive Principles of State Policy. HM Seervai, the great jurist, says in his *Constitutional Law of India* (third edition): "The word 'fundamental' is used in two different senses. The word 'fundamental' as qualifying rights means that the rights are basic to, or essential for, the liberal democracy set up by our Constitution. Articles 13 and 32 show that the human rights protected as fundamental rights are so essential that their protection cannot be left to the sense of duty, or good faith, of those who run the State... The word 'fundamental' in Article 37 also means basic or essential, but it is used in the normative sense of setting before the State goals which it should try to reach. Fundamental rights are backed by legal sanctions; Directive Principles are left to the sense of those charged with the governance of the country. This follows from the fact that the duty imposed on the State by fundamental rights is a legally enforceable duty; the duty imposed by the Directive Principles is a moral duty, so that the word 'duty' in Parts III and IV, is also not used in the same sense" (Page 1601-1602). Later on he says: What would have happened to the governance of our country if the Directive Principles had not been enacted? The answer is: nothing would have happened, if anything, the Government of the country would have been easier... (Pg. 1614).

It is doubtful whether anyone would accept this view now. Can it be said that Directive Principles are in any way redundant? Again, how can anyone say, directive principles are not "essential for the liberal democracy" set up by our Constitution? Are they mere guidelines setting out the goals which the State should try to reach? The goals have been set out in the Preamble itself. Directive Principles are not goals. They are the means, just as much as fundamental rights are, to achieve the goal of "social, economic and political justice" as stated in the preamble. Just because Fundamental Rights are legally enforceable, the Directive Principles do not in any way become less important. The word 'fundamental' as qualifying rights in Part III and as qualifying duties in Part IV is used in the same generic sense indicating that each of these rights are as basic and essential as the other. As Glanville Austin says: "The core of the commitment to the social revolution lies in Part III and IV in the

Fundamental Rights and in the Directive Principles of State Policy. These are the conscience of the Constitution."[47] This is what Bhagwati J. said in *Minerva Mills* case (AIR 1980 SC 1789 at 1846): "The core of the commitment of the social revolution lies... in the fundamental rights and directive principles of State policy..."

The principles set out in the Directive Principles of state policy are fundamental in the governance of the country. In other words the Government has an obligation to implement these principles. Some of the principles relate to social and economic human rights. The Government has an obligation to respect, to protect, and to fulfil these obligations, as set out in Article 2 of the ICESCR (supra). For the purpose of the realisation of these social and economic human rights the Government has an obligation to "take steps," by "all appropriate means", including "particularly the adoption of legislative measures." The objective is to "progressively" achieve the "rights recognised" in these Principles, "to the maximum of its available resources." For this purpose the Government is obliged to take if needed "international assistance and cooperation, especially economic and technical," as provided under the ICESCR.[48]

'Fundamental duties are obligations within the meaning of ICESCR'

The question is not whether these rights are perfect or imperfect, or whether they are judicially enforceable or not. The rights have been identified and recognised in the UDHR and the State has an obligation to take measures towards the realisation of the rights. The measures could be executive actions or through legislation. In either case, judicial remedy cannot be ruled out, for the simple reason that there can be no right without a remedy. If the executive action is inadequate or is illusory or if the legislative

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[47] *The Indian Constitution: Corner Stone of a Nation*; Pg 50.

[48] Article 55 of the UN Charter specifies as one of the purposes of the UN, the promotion of "higher standards of living, full employment, and conditions of economic and social progress and development." Article 56 obliges the states to pledge themselves, "to take joint and separate action in cooperation with the organisation" to this end. One of the main purposes of the UN is to "achieve international cooperation in solving international problems of an economic, social and cultural or humanitarian character." Art. 1(3).

intent is not carried out, the only remedy left in such a situation is through judicial action. It is for the ingenuity of the Court to mould its relief in such manner as it thinks proper.

Thus it is wrong to assume that some of the human rights are not enforceable. Since all human rights are interdependent and indivisible, to consider that some of them are not enforceable would ultimately end up in the denial of all human rights. Our Supreme Court, while expanding the scope of Article 21 of the Constitution, brought several social and economic human rights within the meaning of Right to Life. Thus all basic human rights are fundamental rights by virtue of repeated judicial pronouncements from the Apex Court. As stated in the of *Unnikrishnan v/s State of AP* [(1993) 1 SCC 645, para 165] "In order to treat a right as fundamental right, it is not necessary that it should be expressly stated as one in Part III of the Constitution. The provisions of Part III and Part IV are supplementary and complementary to each other." That is why very often the court reads the two together. There is no conflict between the two. It is wrong to assume that fulfilment of obligations relating to social and economic human rights would impair fundamental rights. That is why we incorporated Article 31-C (25th Amendment Act 1971) which says, "Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19..."[49]

All human rights are enforceable

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[49] In fact all these civil and political rights, as also social, economic and cultural rights are statutory rights under the Protection of Human Rights Act 1993. Under S.1(d) "Human Rights" means

"The rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the international Covenants and enforceable by courts in India."

S.1(f): "International Covenants" means the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th December, 1966."

Let us consider some of the social and economic human rights incorporated in the Directive Principles of State Policy. Article 39 says that the State shall, in particular, direct its policy towards securing—(a) "that the citizens, men and women equally have the right to an adequate means of livelihood". In effect, it recognises what is said in Article 25 of the UDHR: "Everyone has the right to standard of living adequate for the health and well-being of himself and of his family, including food, clothing housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." The question is, what is the meaning of "adequate means of livelihood" or "the right to standard of living adequate to the health... etc." More elaborately, this has been set out in Article 11 (1) and (2) of the ICESCR. It is as follows:

Right to adequate means of livelihood

1. "The State Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including food, clothing and housing, and to the continuous improvement of living conditions. The State Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international co-operation based on free consent.
2. "The State Parties to the present Covenant, recognising the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed.: (a) to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems, in such a way as to achieve the most efficient development and utilisation of natural resources; (b) taking into account the problems of both food-importing and food-exporting

countries, to ensure an equitable distribution of world food supplies in relation to need."

Thus "adequate means of livelihood" includes "adequate food", "clothing and housing", "health", "medical care" and "continuous improvement of living conditions." Interestingly, our Supreme Court has included all these within the meaning "right to life" under Article 21 of the Constitution of India.[50]

Right to food

The right to food is included in the right to adequate standard of living. In fact it flows from "the fundamental right of everyone to be free from hunger" (Art. 11 (2) ICESCR supra). It is interesting to note that the word "fundamental" is nowhere used in relation to any right in the two covenants excepting in respect of this right to be free from hunger. It only emphasizes the importance of this right without which all other rights will have no meaning. No human right is worth anything to a starving man. That is why freedom from starvation is fundamental to live as human being and as such has to be necessarily a part of right to life.

The question of right to food as an enforceable right arose for the first time in our Supreme Court in the case of *Kishen Pattnayak & Anr. V/s State of Orissa* [(1989) Supp (1) SCC 258] It was alleged in the writ petition that the inhabitants of Kalahandi and Koraput districts in the state of Orissa were facing starvation deaths on account of extreme poverty and also due to utter negligence and callousness of the administration and the Government of Orissa. The petition was filed under Art. 32 r/w Art. 21. The Government, apart from denying the allegations, had contented that the petition was not maintainable. The court, however, did not go into this question. The court asked the local District Judge to enquire and make a report, which he did and in which he stated that there was hardly any starvation death. The petitioners were not at all satisfied with the report. What the court did was that it accepted certain statements made by the Advocate-General and expressed "hope and trust that in view of the prompt action that has been taken by the Government, soon the miseries

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[50] See the case of *Chameli Singh & Ors. v/s State of UP* (1996) 2 SCC 549.

of the people of these two districts will be over." Unfortunately, the Court did not deal with the question as to how the right to food could be made an enforceable right.

There is another group of Writ Petitions (WP Nos: 2924/93, 2528/93 & 844/97), pending in the Nagpur Bench of the High Court of Bombay, which relate to malnutrition deaths amongst children in Melghat area, a tribal region in Maharashtra. The court gave certain directions to the Government to provide adequate food health care and employment opportunities to the tribal people. In particular, the court stated that the objective is to "adopt an integrated approach to solve the malnutrition problem, and not in a compartmentalised manner".[51]

Yet another PUCL petition is pending in the Supreme Court in respect of starvation deaths in Orissa. It is hoped the court will innovate and declare that the right to food is an enforceable right. Since we have declared that the right to life includes the right to food, the court cannot consider it imperfect. Assuming it is imperfect, that itself should be a challenge to legal creativity.

'Adequate food'

As the right to be free from hunger, is the most basic right which can never be denied, the State has an obligation to guarantee "adequate food" to everyone. It is something more than food for survival. It is considered as a component of "adequate standard of living." Therefore, "adequate food" must include all those which would go to the realisation of the right to an adequate standard of living. It would thus include nutritious food. This is particularly relevant for a country like ours where 40% of the people live below the poverty line. An adequate standard of living must necessarily mean living conditions above the poverty line. Not that a State would be able to achieve an "adequate standard of living" immediately. But even after five decades of our adopting these rights in our Directive Principles, we have not been able to eradicate poverty for a large number of our people. Art. 11 (2), sub-Articles (a) & (b) of the ICESCR give us the guidelines on how to achieve the requirement of

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[51] See the Telang Memorial lecture on the Right to Life and Liberty by the author.

"adequate food". This, of course, is in addition to the obligation to take all steps to the maximum of its available resources as mentioned in Art. 2(1) of the ICESCR.

'Right to shelter'

As we have seen earlier, the right to shelter is included in the right to life. However, it should not be interpreted narrowly as having a roof over one's head, but it should be considered in a wider sense as an item falling within the meaning of "adequate standard of living." Thus the right to housing would include (a) legal security of tenure, including legal protection against forced evictions, (b) availability of services, materials, facilities and infra-structure, (c) affordability, (d) habitability, (e) accessibility for disadvantaged groups (f) location and (g) cultural adequacy. In other words, it should be considered as the right to live "somewhere in security, peace and dignity." What is important is to guarantee housing rights to all by providing "legislation against forced evictions as an essential basis upon which to build a system of effective protection." When forced evictions take place, it doesn't mean destruction of houses in a slum area. It means removal of individuals, families or communities from their homes, from their land or neighbourhood. It also means destroying the livelihood, culture, community, and also their possessions and belongings, besides the suffering, the trauma and the feeling of insecurity.[52]

Forced evictions

Whenever the right to housing is violated by forced evictions, a number of other rights are also affected. The rights to freedom of movement and to choose one's residence, recognised in many international laws and national constitutions, are infringed when forced evictions occur. The right to security of the person, widely established, means little in practical terms when people are forcibly evicted with violence, bulldozers and intimidation. Arrests or killings of community leaders opposing forced evictions are common and violate the right to life, freedom of expression and the freedom to join organisations of one's choice.[53]

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[52] See: *Forced Evictions & Human Rights: Fact Sheet No. 25*, published by the World Campaign for Human Rights, Vienna, June 1993.

[53] *ibid* Pg 17.

In all forced evictions, women and children are the worst sufferers. Children lose their right to education. Men and women lose their source of employment, and their right to work is breached. When they are thrown on the street, their right to health is affected. When families and communities are torn apart by eviction, the right to family life is infringed. When the eviction squads enter one's home, the right to privacy which is a part of the right to life, and the right to security of the home are violated.[54]

In this connection, if one reads Art. 11 of the ICESCR, there are no limitations on the right to housing. However, it is possible that the State may evict persons for the purpose of protecting the environment or in the interests of public health or public order. Even then, the right to housing remains the primary concern and all steps will have to be taken for rehabilitating and/or for compensating the affected persons. Article 4 of the ICESCR says: "The States Parties to the present Covenant recognise that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society." Thus, even if a law is made, it should be compatible with the right to housing of everyone, and it should be solely for general welfare in a democratic society.

A reference could be made to the South African Constitution wherein the right to housing is expressly recognised. Its Constitution says:

South African Constitution

"Section 26 (1): Everyone has the right to have access to adequate housing.

(2) "The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) "No one may be evicted from their home, or have their demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

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[54] *ibid* Pg 17.

This far-reaching provision has already had legislative impact On October 4, 2000, the constitutional court of South Africa delivered a decision in respect of the housing rights of persons forced to live in deplorable conditions while waiting for their turn to be allocated low-cost housing. The judgement significantly advanced the right to adequate housing domestically as well as internationally by relying on section 39 of the Constitution of S. Africa, Art. 11.1 of the ICESCR and the minimum core obligations of States Parties to the covenant set out in General Comment No.3.

The court held that relevant international law must provide guidance to domestic courts, but more importantly, that as a signatory to the Covenant, South Africa was bound to uphold the principles therein. The court also held that the State was obligated to abide by its commitments in proactive and practical ways, despite financial constraints, and that the programmes and policies necessary to meet these commitments are matters appropriate for judicial review.

Justice Yakoob who decided the case (*Irene Grootboom*) describing the minimum obligation of the State said: "It is the floor beneath which the conduct of the State must not drop, if there is to be compliance with the obligation. Each right is a 'minimum essential' level that must be satisfied" by the State. He directed that the State should device a comprehensible and workable plan to meet its obligations. Realising the problem was unlikely to be solved in the foreseeable future, the Court directed the Government to make provisions for temporary relief. In this, financial constraints can't be an excuse.[55]

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[55] In the case of *Municipal Council, Ratlam v/s Vardichand* (1980) our Supreme court had said: "The law will relentlessly be enforced and the poor finance will be a poor alibi when people in misery cry for justice."

LECTURE XII

Social and Economic Rights and Directive Principles of State Policy (Continued)

Right to work

Our Supreme Court has included the right to work within the scope of the right to life (Art. 21).[56] Article 41 of the Directive Principles recognises the right to work and it is as follows: "The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in cases of undeserved want." Correspondingly, Article 6 of the ICESCR has the following provision: "The States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right." It further obliges the State to take certain steps for the full realisation of this right; viz., technical and vocational guidance, training programmes, policies, and techniques to "steady economic, social and cultural development and full and productive employment" etc. Article 23 of the UDHR is more precise: "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work, and to protection against unemployment."

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[56] *Delhi Transport Corporation v/s DTC Mazdoor Congress.* (AIR1991 SC 101).

The right to work does not mean that everyone is guaranteed a job. Work depends on several human factors, such as one's abilities, skills aptitudes and desires; it also depends on society's needs and capacity. It is understood in a broader sense as a right to enter into employment and a right not to be unjustly deprived of employment. It means that the State should provide for access to employment, freedom from forced labour and security in employment. The Government concerned should make every possible effort to ensure full employment and create employment opportunities to the maximum of its capacity. It also should see that there is no discrimination in the matter of access to employment. There should also be freedom of choice. There can't be any forced labour. Our Constitution has expressly prohibited forced labour.[57]

The security of tenure means that no one can be arbitrarily dismissed from work. In fact the right to work would be meaningless without a fundamental guarantee against arbitrary dismissal. We have several laws guaranteeing against arbitrary deprivation of work and providing for judicial remedy. Unfortunately, there is a concerted effort to change the law enabling the management to hire and fire any worker, all in the name of globalisation, leading to more unemployment and adding to "undeserved want."

Just and favourable conditions of work

The right to just and favourable conditions of work is a corollary to the right to work. Article 7 of the ICESCR says: "The States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) remuneration which provides all workers, as a minimum, with:

(i) fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

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[57] Art. 23 of the Constitution of India. Also see Art. 8 3 (a) & (b) of the ICCPR.

(ii) a decent living for themselves and their families in accordance with the provisions of the present covenant;

(b) safe and healthy working conditions;

(c) equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to considerations other than those of seniority and competence;

(d) rest, leisure and reasonable limitation of working hours and periodic holidays with pay as well as remuneration for public holidays."

Article 23 of the UDHR had initially recognised this, which came to be elaborated in the ICESCR. The components for guaranteeing this right are (a) minimum remuneration, (b) fair wages and equal remuneration, (c) decent living, safe and healthy working conditions, (e) equal opportunity for promotion and (f) rest, leisure and limitation of working hours. The obligation of the State is to guarantee that the above conditions of work would be applicable not only where the State itself is the employer, but also in the case of all employments. In other words, the State will have to provide for mechanisms of enforcement of these obligations through legislative measures. Very often, employment is a matter of private contract, but subject to certain minimum, mandatory provisions as may be provided under various laws.[58]

Under the Indian Constitution the relevant provisions are:

Art. 39: The State shall, in particular, direct its policy towards securing... (d) that there is equal pay for equal work for both men and women; (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter into avocations unsuited to their age or strength;

Art. 42: The State shall make provision for securing just and humane conditions of work and for maternity relief.

Art. 43: The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage

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[58] International Labour Organisation (ILO) instruments provide for many of these guarantees.

conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or cooperative basis in rural areas.

We have now a large number of laws such as the Industrial Disputes Act, the Factories Act, the Shops and Establishment Act and various labour laws. What is important is that the worker's right to just and fair conditions of work is a human right. Some people think that with globalisation and liberalisation, the workers' rights can be reduced to insignificance. Such an attitude will result in more unemployment which is the negation of the right to livelihood itself. In the absence of adequate social security system, it would mean more poverty. Poverty is always a discriminatory situation which will end up in denying the "equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present covenant" (Art.3 of ICESCR).

Both under the ICESCR and the Indian Constitution, what is contemplated is the progressive achievement of all the rights for all people. In other words, the State has an obligation to move as expeditiously and effectively as possible towards the full realisation of the rights in question. It means the State cannot adopt any "regressive" measure which will hinder the objective of full realisation of these rights. We have incorporated this in Article 38 (2) which says: "The State shall in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst groups of people residing in different areas or engaged in different vocations."

Full realisation of the Rights

The objective of minimising "the inequalities of income and... and eliminating inequalities in status, facilities, and opportunities" is in consonance with Article 3 of the ICESCR (supra). It is also in consonance with our Preamble which has the objective of establishing "a social order in which justice, social economic and political, shall inform all the institutions of the national life" [Art. 38 (1)]. With this objective, we have provided under Article 39 (b) "that the ownership and control of the material

resources of the community are so distributed as to subserve the common good" (c) "that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment".[59]

Article 39(f) says: "The children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment." Article 10(3) of the ICESCR is the corresponding provision: "Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to their life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law."

Rights of the children

What is important is protection against exploitation. Under Article 24 of our Constitution, "No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment." We have not banned child labour as such. We have the Child Labour (Prohibition and Regulation) Act, 1986. We have several laws governing child and civil law, child and family law, child and labour law, the law for adoption of children etc. We have also the Juvenile Justice (Care and Protection of Children) Act, 2000.

Internationally, the most important documents are the Declaration of the Rights of the Child (1959) and the Convention on the Rights of the Child (1989). The Declaration was a call "upon parents, upon men and women as individuals and upon voluntary organisations, local authorities and national Governments

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[59] Directive Principles of State Policy can as well be considered as a "socialist manifesto" and the Preamble refers to the Constitution as "a Sovereign Socialist Secular Democratic Republic."

to recognise" the rights of the child so that "he may have a happy childhood" and enjoy "for his own good and for the good of the society, the rights and freedoms" set forth in the Declaration. The most important principles are the following:

Principle 2: The child shall enjoy special protection, and shall be given opportunities and facilities, by law and other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and conditions of freedom and dignity. In the enactment of laws for this purpose the best interests of the child shall be of paramount consideration.

Principle 8: The child shall in all circumstances be among the first to receive protection and relief.

Principle 9: The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic in any form. The child shall not be admitted to employment before an appropriate minimum age, he shall in no case be caused or permitted to engage in any occupation or employment or employment which would prejudice his health and education, or interfere with the physical, mental or moral development.

Under the Covenant, a child has been defined as "every human being below the age of 18 years..." In the Juvenile Justice Act, we have accepted this definition, though several other laws still mention the age of 14 or 16, which have to be updated. Article 3 provides for "the best interests of the child" as a primary concern in all actions concerning the children. Our courts have now adopted this principle in all litigations concerning, particularly, custody of children in family disputes and in matters of adoption. One of the important principles is contained in Article19.

Art. 19(1): States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s), or any other person who has the care of the child.

(2): Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment... and... for judicial involvement."

With all these international instruments and national laws, it is regretted that a large number of children in India have been the victims of violence, torture, and sexual abuse.

We have already seen that the right to education is included in the right to life. Article 45 provides for free and compulsory education for all children until they the age of fourteen years. Article 13 (1) of the ICESCR says: "The States Parties to the present Covenant recognise the right of everyone to education." They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

Right to education

Under sub-Article 2 (a) "primary education shall be compulsory and available for all." Under Article 26 Sub-Art. (2) of the UDHR, it is declared that "education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms." In fact, that is the object of all human rights and in that sense all human rights are interdependent.[60]

Article 48-A of the Directive Principles says: "The State shall endeavour to protect and improve the environment and to safeguard the forests and wild-life of the country." Though there is

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[60] The Government has got the 93rd Constitution Amendment Bill passed by both the Houses and is awaiting the approval from the State Legislatures.

no corresponding provision in the ICESCR, Article 12 can be referred to in this context. It recognises "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." To achieve the full realisation of this right, one of the steps to be taken shall be sub-Art. 2 (b): "the improvement of all aspects of environmental industrial hygiene".

Right to clean environment

Our Supreme Court has held that the right to environment is also included in the scope of Article 21. The right to life includes a fundamental right to a clean and hygienic environment. An increase in pollution threatens the very survival of the human race.

We have several Acts for safeguarding the environment, such as the Water Pollution Act 1974, Air Pollution Act, 1981, Environment Protection Act, 1986 etc. Legally, it is virtually impossible for any industry to start or expand without prior environmental clearance. Environmental Impact Assessment Report and Environmental Management Plans are an absolute precondition to start an industry and public hearings have become necessary for factory expansions. The law frowns upon any kind of pollution whether it is air, water, or noise. It also controls dumping of hazardous wastes and does not permit ravage of coast lines or trimming of the forest cover.

The Supreme Court has in recent years laid down four major principles which are to govern environmental law: (1) Precautionary principle; (2) Polluter pays principle; (3) Doctrine of public trust; (4) Trans-generational equity principle. The precautionary principle requires Governments to take preventive measures for stopping pollution. The polluter pays principle lays down that the cost of pollution, whether on the environment or on the people, has to be paid by the polluter. The public trust doctrine lays down that all common resources such as rivers, forests, mangroves, air, etc., are owned by the State not for itself but in trust for all the citizens in common. The trans-generational equity principle provides that formulation and implementation of environmental laws has to be based not merely on how the present environment will be affected by a given activity but also how the future generations will be affected.

While these are salutary principles to be observed, the courts have also to keep in mind that their orders should not in any way lead to situation of denial of social justice. That is why particularly in a poor country like ours it is necessary that social justice precede environmental justice.[61]

The objective of the State is to strive for promoting the welfare of the people by securing and protecting a social order in

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[61] 1. Stockholm Declaration of the UN on Human Environment: "The natural resources of the earth including the air, water, land, flora and fauna, and especially representative samples of natural eco-system, must be safeguarded for the benefit of the present and future generations... Nature conservation including wildlife must, therefore, receive importance in planning for economic development."

2. *M.C. Mehta v/s Kamal Nath* (1997) 1 SCC 388; *State of Tamilnadu v/s Hind Stone* AIR 1981 SC 711; *Vellore Citizens Welfare Forum v/s Union of India* 1996 (7) J.T. 381

3. It is interesting to note the Supreme Court of the Republic of the Philippines in a case decided on 30th July 1993 (decision GR No. 101083), stated as follows:

"This case has a special and novel element. Petitioners minors (represented by their parents) assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right, as hereinafter expounded, considers the 'rhythm and harmony of nature'. Nature means the created world in its entirety. Such rhythm and harmony indispensably include, *inter-alia*, the judicious disposition, utilisation, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources, to the end that their exploration, development and utilisation be equitably accessible to the present as well as future generations. Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors' assertion of the right to a sound environment constitutes at the same time, the performance of their obligation to ensure the protection of that right for the generations to come."

which justice, social, economic and political shall be meted out to all. (Art. 38 (1) of the Directive Principles). But the welfare of all people is not possible unless the wide disparity and inequality prevailing in society are eliminated. Thus it becomes necessary to eradicate poverty and give everyone a chance to develop. As poverty is a brutal denial of human rights, the State is obliged to ensure that everyone is given an opportunity to develop fully.

Poverty—a brutal denial of human rights

Till recently, the emphasis was on elimination of violations of human rights. However, it has now been recognised that unless we have a comprehensive promotional scheme of human rights, progressive realisation of human rights will not be possible. For example, promoting women's rights means not only protecting them from violations of their rights, but also increasing access to develop and strengthen their rights. Similarly, problems of poverty cannot be solved unless poverty itself is eliminated and opportunities given to all to develop. It is therefore necessary to sustain development and sustainable human development becomes a means to promote human rights and dignity. Human rights and sustainable human development are interdependent. The ultimate goal of all human rights is "the free and full development of the personality of all." (See Art. 29 UDHR). Such a development will not be possible where there is no rule of law; where discrimination based on gender is rampant; where fundamental freedoms of free speech, and opinion and expression are arbitrarily restricted; and where large numbers of people live in abject poverty.

In 1986, the UN General Assembly made a Declaration on the Right to Development, explicitly reaffirming the existence of a human right to development. Such a right was implicit in the UDHR and in the ICESCR. The declaration not only reaffirmed the right to development but it also elaborated the content of the right as well as the specific obligations for states and Governments that flow from the right. The declaration defines development as "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals." The right to development is an "inalienable...

Right to development

human right" of "every human person (and) all peoples" (Article 1) "to exercise full and complete sovereignty over all their natural wealth and resources" in pursuit of "their economic, social and cultural development" (Preamble).

Broadly the rights are the following:

1. *Right to participate*: Every person is entitled to "active, free and meaningful participation in development" and as an "active participant" to "contribute to and enjoy economic, social cultural and political development."

2. *The right to be "the central subject of development* (Article 20)" where people and their well-being come first, ahead of all other objectives and priorities.

3. *The right to non-discrimination* in development "without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." (Preamble).

4. *The right to self-determination*: "The human right to development also implies the full realisation of the right of peoples to self-determination, which includes... their inalienable right to full sovereignty over all their natural wealth and resources." [Article 1(2)].

5. *The right to "the free and complete fulfilment of the human being"* with "full respect" for "human rights and fundamental freedoms." [Article 1(2)].

6. *The right to enjoyment of all human rights:* "The promotion of respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms". "All human rights and fundamental freedoms are indivisible and interdependent." (Preamble).

The obligations of the states are the following:

1. The duty to "undertake, at the national level, all necessary measures for the realisation of the right to development" [Article 8(1)] and the duty "for the creation of national conditions favourable to the right to development." [Article 3(1)].

2. The duty "to eliminate the massive and flagrant violations of the human rights of people and human beings" (Article 5) and to eradicate "all social injustices." [Article 8(1)].

3. The duty "to eliminate obstacles to development resulting from failure to observe civil and political rights as well as economic, social and cultural rights." [Article 6(3)].

4. The duty not to discriminate on the basis of "race, sex, language or religion." [Article 8(1)].

5. The duty "to encourage popular participation in all spheres as an important factor in development." [Article 8(2)].

Internationally the states have the duty "to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realisation of the right to development."

Since the Declaration several world conferences have been held to reaffirm the right to development as a "universal and inalienable right and an integral part of fundamental human rights." They are, the UN World Conference on Human Rights (Vienna), International Conference on Population and Development (Cairo), World Summit on Social Development, (Copenhagen), Fourth World Conference on Women (Beijing) and the recent Earth Summit in Johannesburg. So the right to development is slowly and certainly taking the shape of a human rights system guaranteed by international law. It was in the conference held in Vienna in 1993 that a recommendation was made to establish the post of a High Commissioner for Human Rights to promote and protect all human rights. This was accepted by the UN General Assembly in December 1993. Mary Robinson became the first High Commissioner for Human Rights.

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ANNEXURES

ANNEXURE 1

Universal Declaration of Human Rights

Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948

On December 10, 1948 the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights the full text of which appears in the following pages. Following this historic act the Assembly called upon all member countries to publicize the text of the Declaration and "to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions, without distinction based on the political status of countries or territories."

PREAMBLE

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race,

colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

(1) Everyone has the right to freedom of movement and residence within the borders of each State.

(2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

(1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

(1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association.

Article 21

(1) Everyone has the right to take part in the Government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of Government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

ANNEXURE 2

International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force *Mar. 23, 1976.*

PREAMBLE

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of states under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following Articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this Article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this Article shall be invoked to delay or to

prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3 (a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the

interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a

miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Article 16

Everyone shall have the right to recognition everywhere as a person before the law.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have

or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals, or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this Article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

Article 25

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 27

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

PART IV

Article 28

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.

2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.

3. The members of the Committee shall be elected and shall serve in their personal capacity.

Article 29

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in Article 28 and nominated for the purpose by the States Parties to the present Covenant.

2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.

3. A person shall be eligible for renomination.

Article 30

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.

2. At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with Article 34, the Secretary-General of the United

Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

Article 31

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

Article 32

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the chairman of the meeting referred to in Article 30, paragraph 4.

2. Elections at the expiry of office shall be held in accordance with the preceding Articles of this part of the present Covenant.

Article 33

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the chairman shall immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

Article 34

1. When a vacancy is declared in accordance with Article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with Article 29 for the purpose of filling the vacancy.

2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.

3. A member of the Committee elected to fill a vacancy declared in accordance with Article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that Article.

Article 35

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

Article 36

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

Article 37

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.

2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

Article 38

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

Article 39

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Twelve members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

Article 40

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:

(a) Within one year of the entry into force of the present Covenant for the States Parties concerned;

(b) Thereafter whenever the Committee so requests.

2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.

3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.

4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this Article.

Article 41

1. A State Party to the present Covenant may at any time declare under this Article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this Article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this Article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation,

or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) The Committee shall hold closed meetings when examining communications under this Article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the present Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral

submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this Article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph 1 of this Article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other states Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this Article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 42

1. (a) If a matter referred to the Committee in accordance with Article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under Article 41.

3. The Commission shall elect its own chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with Article 36 shall also service the commissions appointed under this Article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the chairman of the Committee a report for communication to the States Parties concerned:

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(b) If an amicable solution to the matter on tie basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

(c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;

(d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this Article are without prejudice to the responsibilities of the Committee under Article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this Article.

Article 43

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under Article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 44

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Article 45

The Committee shall submit to the General Assembly of the United Nations, through the Economic and Social Council, an annual report on its activities.

PART V

Article 46

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the

respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 47

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART VI

Article 48

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this Article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all states which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 49

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force

three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 50

The provisions of the present Covenant shall extend to all parts of federal states without any limitations or exceptions.

Article 51

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 52

Irrespective of the notifications made under Article 48, paragraph 5, the Secretary-General of the United Nations shall inform all states referred to in paragraph 1 of the same Article of the following particulars:

(a) Signatures, ratifications and accessions under Article 48;

(b) The date of the entry into force of the present Covenant under Article 49 and the date of the entry into force of any amendments under Article 51.

Article 53

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all states referred to in Article 48.

ANNEXURE 3

Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, G.A. res. 44/128, annex, 44 UN GAOR Supp. (No. 49) at 207, UN Doc. A/44/49 (1989), entered into force *July 11, 1991*

The States Parties to the present Protocol,

Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights,

Recalling Article 3 of the Universal Declaration of Human Rights, adopted on 10 December 1948, and Article 6 of the International Covenant on Civil and Political Rights, adopted on 16 December 1966,

Noting that Article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable,

Convinced that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life,

Desirous to undertake hereby an international commitment to abolish the death penalty,

Have agreed as follows:

Article 1

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.

2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Article 2

1. No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.

2. The State Party making such a reservation shall at the time of ratification or accession communicate to the Secretary-General of the United Nations the relevant provisions of its national legislation applicable during wartime.

3. The State Party having made such a reservation shall notify the Secretary-General of the United Nations of any beginning or ending of a State of war applicable to its territory.

Article 3

The States Parties to the present Protocol shall include in the reports they submit to the Human Rights Committee, in accordance with Article 40 of the Covenant, information on the measures that they have adopted to give effect to the present Protocol.

Article 4

With respect to the States Parties to the Covenant that have made a declaration under Article 41, the competence of the Human Rights Committee to receive and consider communications when a State Party claims that another State Party is not fulfilling its obligations shall extend to the provisions of the present Protocol, unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession.

Article 5

With respect to the States Parties to the first Optional Protocol to the International Covenant on Civil and Political Rights adopted on 16 December 1966, the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction shall extend to the provisions of the present Protocol, unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession.

Article 6

1. The provisions of the present Protocol shall apply as additional provisions to the Covenant.

2. Without prejudice to the possibility of a reservation under Article 2 of the present Protocol, the right guaranteed in Article 1, paragraph 1, of the present Protocol shall not be subject to any derogation under Article 4 of the Covenant.

Article 7

1. The present Protocol is open for signature by any State that has signed the Covenant.

2. The present Protocol is subject to ratification by any State that has ratified the Covenant or acceded to it. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State that has ratified the Covenant or acceded to it.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all states that have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 8

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.

2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

Article 9

The provisions of the present Protocol shall extend to all parts of federal states without any limitations or exceptions.

Article 10

The Secretary-General of the United Nations shall inform all states referred to in Article 48, paragraph 1, of the Covenant of the following particulars:

(a) Reservations, communications and notifications under Article 2 of the present Protocol;

(b) Statements made under Articles 4 or 5 of the present Protocol;

(c) Signatures, ratifications and accessions under Article 7 of the present Protocol:

(d) The date of the entry into force of the present Protocol under Article 8 thereof.

Article 11

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all states referred to in Article 48 of the Covenant.

ANNEXURE 4

International Covenant on Economic, Social and Cultural Rights

PREAMBLE

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of states under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following Articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programs, policies and techniques to achieve steady economic, social and cultural

development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

Article 8

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this Article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

Article 9

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic

and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programs, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this Article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this Article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Article 15

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

PART IV

Article 16

1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.

2. (a) All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant;

(b) The Secretary-General of the United Nations shall also transmit to the specialized agencies copies of the reports, or any relevant parts therefrom, from States Parties to the present Covenant which are also members of these specialized agencies in so far as these reports, or parts therefrom, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments.

Article 17

1. The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a program to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialized agencies concerned.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant.

3. Where relevant information has previously been furnished to the United Nations or to any specialized agency by any State Party to the present Covenant, it will not be necessary

to reproduce that information, but a precise reference to the information so furnished will suffice.

Article 18

Pursuant to its responsibilities under the Charter of the United Nations in the field of human rights and fundamental freedoms, the Economic and Social Council may make arrangements with the specialized agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities. These reports may include particulars of decisions and recommendations on such implementation adopted by their competent organs.

Article 19

The Economic and Social Council may transmit to the Commission on Human Rights for study and general recommendation or, as appropriate, for information the reports concerning human rights submitted by states in accordance with Articles 16 and 17, and those concerning human rights submitted by the specialized agencies in accordance with Article 18.

Article 20

The States Parties to the present Covenant and the specialized agencies concerned may submit comments to the Economic and Social Council on any general recommendation under Article 19 or reference to such general recommendation in any report of the Commission on Human Rights or any documentation referred to therein.

Article 21

The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant.

Article 22

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

Article 23

The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the governments concerned.

Article 24

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

Article 25

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

PART V

Article 26

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the

International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this Article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all states which have signed the present Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 27

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 28

The provisions of the present Covenant shall extend to all parts of federal states without any limitations or exceptions.

Article 29

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him

whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.

Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 30

Irrespective of the notifications made under Article 26, paragraph 5, the Secretary-General of the United Nations shall inform all states referred to in paragraph 1 of the same article of the following particulars:

(a) Signatures, ratifications and accessions under Article 26;

(b) The date of the entry into force of the present Covenant under Article 27 and the date of the entry into force of any amendments under Article 29.

Article 31

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all states referred to in Article 26.

ANNEXURE 5

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984)], entered into force *June 26, 1987.*

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity of the human person,

Considering the obligation of states under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

PART I

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This Article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a State of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. No State Party shall expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in Article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to Article 8 to any of the states mentioned in paragraph 1 of this Article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence

referred to in Article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this Article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a Stateless person, with the representative of the State where he usually resides.

4. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the states referred to in Article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this Article shall promptly report its findings to the said states and shall indicate whether it intends to exercise jurisdiction.

Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found shall in the cases contemplated in Article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in Article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in Article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in Article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 8

1. The offences referred to in Article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between states Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between states Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the states required to establish their jurisdiction in accordance with Article 5, paragraph 1.

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in Article 4, including the supply of all evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 of this Article in conformity with any treaties on mutual judicial assistance that may exist between them.

Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who

may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this Article shall affect any right of the victim or other persons to compensation which may exist under national law.

Article 15

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of, or with the consent or acquiescence of a public official, or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

PART II

Article 17

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the states Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by states Parties.

Each State Party may nominate one person from among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and who are willing to serve on the Committee against Torture.

3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the states Parties.

5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if re-nominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3 of this Article.

6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the states Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Article 18

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Six members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.

4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

5. The States Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement to the United Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to paragraph 3 of this Article.

Article 19

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.

2. The Secretary-General of the United Nations shall transmit the reports to all states Parties.

3. Each report shall be considered by the Committee

which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.

4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this Article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with Article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1 of this Article.

Article 20

1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.

2. Taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.

3. If an inquiry is made in accordance with paragraph 2 of this Article, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.

4. After examining the findings of its member or members submitted in accordance with paragraph 2 of this Article, the Commission shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.

5. All the proceedings of the Committee referred to in paragraphs 1 to 4 of this Article shall be confidential, and at all stages of the proceedings the co-operation of the State Party shall be sought. After such proceedings have been completed with regard

to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with Article 24.

Article 21

1. A State Party to this Convention may at any time declare under this Article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this Article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this Article if it concerns a State Party which has not made such a declaration. Communications received under this Article shall be dealt with in accordance with the following procedure;

(a) If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it under this Article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international

law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention;

(d) The Committee shall hold closed meetings when examining communications under this Article;

(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in this Convention. For this purpose, the Committee may, when appropriate, set up an ad hoc conciliation commission;

(f) In any matter referred to it under this Article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this Article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this Article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other states Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a

withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this Article; no further communication by any State Party shall be received under this Article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 22

1. A State Party to this Convention may at any time declare under this Article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. The Committee shall consider inadmissible any communication under this Article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.

3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this Article to the attention of the State Party to this Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

4. The Committee shall consider communications received under this Article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.

5. The Committee shall not consider any communications from an individual under this Article unless it has ascertained that:

(a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;

(b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.

6. The Committee shall hold closed meetings when examining communications under this Article.

7. The Committee shall forward its views to the State Party concerned and to the individual.

8. The provisions of this Article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this Article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other states Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this Article; no further communication by or on behalf of an individual shall be received under this Article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party has made a new declaration.

Article 23

The members of the Committee and of the ad hoc conciliation commissions which may be appointed under Article 21, paragraph 1 *(e)*, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 24

The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

PART III

Article 25

1. This Convention is open for signature by all states.

2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 26

This Convention is open to accession by all states. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 27

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28

1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in Article 20.

2. Any State Party having made a reservation in accordance with paragraph 1 of this Article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 29

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary General shall thereupon communicate the

proposed amendment to the States Parties with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 of this Article shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.

3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

Article 30

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this Article. The other States Parties shall not be bound by paragraph 1 of this Article with respect to any State Party having made such a reservation.

3. Any State Party having made a reservation in accordance with paragraph 2 of this Article may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 31

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.

3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

Article 32

The Secretary-General of the United Nations shall inform all states Members of the United Nations and all states which have signed this Convention or acceded to it of the following:

(a) Signatures, ratifications and accessions under Articles 25 and 26;

(b) The date of entry into force of this Convention under Article 27 and the date of the entry into force of any amendments under Article 29;

(c) Denunciations under Article 31.

Article 33

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all states.

ANNEXURE 6

Convention on the Prevention and Punishment of the Crime of Genocide

Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948.

The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (1) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world;

Recognizing that at all periods of history genocide has inflicted great losses on humanity; and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required;

Hereby agree as hereinafter provided.

Article 1

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article 2

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Article 3

The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.

Article 4

Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article 5

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3.

Article 6

Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article 7

Genocide and the other acts enumerated in Article 3 shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article 8

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article 3.

Article 9

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Article 10

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

Article 11

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 12

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

Article 13

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a process-verbal and transmit a copy of it to each Member of the United Nations and to each of the non-member states contemplated in Article 11.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

Article 14

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

Article 15

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

Article 16

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

Article 17

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member states contemplated in Article 11 of the following:

(a) Signatures, ratifications and accessions received in accordance with Article 11;

(b) Notifications received in accordance with Article 12;

(c) The date upon which the present Convention comes into force in accordance with Article 13;

(d) Denunciations received in accordance with Article 14;

(e) The abrogation of the Convention in accordance with Article 15;

(f) Notifications received in accordance with Article 16.

Article 18

The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to all Members of the United Nations and to the non-member states contemplated in Article 11.

Article 19

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

ANNEXURE 7

THE CONSTITUTION OF INDIA

PREAMBLE

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a [SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC] and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the (unity and integrity of the Nation);

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

Part -III
FUNDAMENTAL RIGHTS

General

12. *Definition* – In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the states and all local or other authorities within the territory of India or under the control of the Government of India.

13. *Laws inconsistent with or in derogation of the fundamental rights* –

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this Article, unless the context otherwise requires.-

a. "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usages having in the territory of India the force of law;

b. "laws in force" includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this Article shall apply to any amendment of this Constitution made under Article 368.

Right of Equality

14. *Equality before law* – The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

15. *Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth* –

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to –

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places

of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this Article shall prevent the State from making any special provision for women and children.

(4) Nothing in this Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

16. *Equality of opportunity in matters of public employment* –

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State.

(3) Nothing in this Article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union Territory prior to such employment or appointment.

(4) Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(5) Nothing in this Article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

17. *Abolition of Untouchability* –

"Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

18. *Abolition of titles* –

1. No title, not being a military or academic distinction, shall be conferred by the State.

2. No citizen of India shall accept any title from any foreign State.

3. No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.

4. No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

Right to Freedom

19. *Protection of certain rights regarding freedom of speech etc* –

(1) All citizens shall have the right-

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; and

(f) omitted;

(g) to practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing in sub-clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to –

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

20. *Protection in respect of conviction for offences* –

(1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

21. *Protection of life and personal liberty –*

No person shall be deprived of his life or personal liberty except according to procedure established by law.

22. *Protection against arrest and detention in certain cases –*

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply (a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless – (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe –

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

Right against Exploitation

23. *Prohibition of traffic in human beings and forced labour* –

(1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this Article shall prevent the State from imposing compulsory service for public purpose, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

24. *Prohibition of employment of children in factories, etc.* –

No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment. Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

Right to Freedom of Religion

25. *Freedom of conscience and free profession, practice and propagation of religion* –

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this Article shall affect the operation of any existing law or prevent the State from making any law –

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I – The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion.

Explanation II – In sub-clause (b) of clause (2) referer ... to Hindus shall be construed as including a reference to pers... professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

26. *Freedom to manage religious affairs* –

Subject to public order, morality and health, every religious denomination or any section thereof shall have the right-

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law.

27. *Freedom as to payment of taxes for promotion of any particular religion* –

No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religions denomination.

28. *Freedom as to attendance at religious instruction or religious worship in certain educational institutions* –

(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

Cultural and Educational Rights

29. *Protection of interests of minorities* –

(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

30. *Right of minorities to establish and administer educational institutions* –

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the

ground that it is under the management of a minority, whether based on religion or language.

Saving of certain laws

31B. *Validation of certain Acts and Regulations* –

Without prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

31C. *Saving of laws giving effect to certain directive principles* –

Notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:

Provided that where such law is made by the Legislature of a State, the provisions of this Article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

Right to Constitutional Remedies

32. *Remedies for enforcement of rights conferred by this Part* –

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, mandamus, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this Article shall not be suspended except as otherwise provided for by this Constitution.

Part – IV
DIRECTIVE PRINCIPLES OF STATE POLICY

36. *Definition* – In this Part, unless the context otherwise requires, "the State" has the same meaning as in Part III.

37. *Application of the principles contained in this Part* – The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

38. State to secure a social order for the promotion of welfare of the people –

(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

(2) The State shall, in particular, strive to minimize the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

39. Certain principles of policy to be followed by the State – The State shall, in particular, direct its policy towards securing –

(a) that the citizens, men and women equally, have the right to an adequate means to livelihood;

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

(d) that there is equal pay for equal work for both men and women;

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

39 A. *Equal justice and free legal aid* –

The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

40. *Organisation of village panchayats* –

The State shall take steps to organize village *panchayats* and endow them with such powers and authority as may be necessary to enable them to function as units of self-Government.

41. *Right to work, to education and to public assistance in certain cases* –

The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

42. *Provision for just and humane conditions of work and maternity relief* –

The State shall make provision for securing just and humane conditions of work and for maternity relief.

43. *Living wage, etc. for workers* –

The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

43A. *Participation of workers in management of industries* –

The State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry.

44. *Uniform civil code for the citizens* –

The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

45. *Provision for free and compulsory education for children* –

The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

46. *Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections* –

The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

47. *Duty of the State to raise the level of nutrition and the standard of living and to improve public health* –

The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

48. *Organisation of agriculture and animal husbandry* –

The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

48A *Protection and improvement of environment and safeguarding of forests and wild life* –

The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

49. *Protection of monuments and places and objects of national importance* –

It shall be the obligation of the State to protect every monument or place or object of artistic or historic interests, declared by or under law made by Parliament to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be.

50. *Separation of judiciary from executive* –

The State shall take steps to separate the judiciary from the executive in the public services of the State.

51. *Promotion of international peace and security* –

The State shall endeavour to –

(a) promote international peace and security;

(b) maintain just and honourable relations between nations;

(c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and encourage settlement of international disputes by arbitration.

Part - IV A
FUNDAMENTAL DUTIES

51A. *Fundamental duties* –

It shall be the duty of every citizen of India –

(a) to abide by the Constitution and respect its ideals and institutions, the national Flag and the National Anthem;

(b) to cherish and follow the noble ideals which inspired our national struggle for freedom;

(c) to uphold and protect the sovereignty, unity and integrity of India;

(d) to defend the country and render national service when called upon to do so;

(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;

(f) to value and preserve the rich heritage of our composite culture;

(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;

(h) to develop the scientific temper, humanism and the spirit of inquiry and reform;

(i) to safeguard public property and to abjure violence;

(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

ANNEXURE 8

D.K. Basu v/s State of West Bengal
AIR 1997 SC 610

22. Custodial death is perhaps one of the worst crimes in a civilised society governed by the Rule of Law. The rights inherent in Articles 21 and 22 (1) of the Constitution require to be jealously and scrupulously protected. We cannot wish away the problem. Any form of torture or cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchism. No civilised nation can permit that to happen. Does a citizen shed off his fundamental right to life, the moment a policeman arrests him? Can the right to life of a citizen be put in abeyance on his arrest? These questions touch the spinal cord of human rights jurisprudence. The answer, indeed, has to be an emphatic "No". The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, undertrials, detenus and other prisoners in custody, except according to the procedure established by law by placing such reasonable restrictions as are permitted by laws.

36. We, therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest

or detention till legal provisions are made in that behalf as preventive measures:

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or and through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if

any, present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer affecting the arrest and its copy provided to the arrestee.

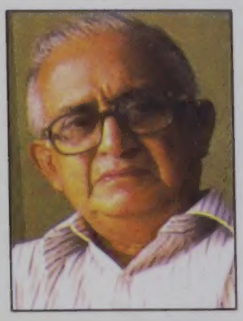
(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory, Director, Health Services should prepare such a panel for all Tehsils and Districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and state headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous police board.

37. Failure to comply with the requirements hereinabove mentioned shall apart from rendering the concerned official liable for departmental action, also render him liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of the country, having territorial jurisdiction over the matter."



As a Judge in the Bombay City Civil and Sessions Court between 1968 and 1980, and subsequently in the Bombay High Court between 1986-1991, Justice Hosbet Suresh is remembered as one in whose mind the Constitution's pledge to the common Indian was always uppermost.

Among the judgements delivered by him and one which must rank high in the annals of Indian jurisprudence was his historic verdict in *Subhash Desai v/s Sharad J Rao* (AIR 1994 SC 2277) that set aside the election of a member of Maharashtra's legislative assembly (MLA) on the ground that he had misused religion and indulged in religious propaganda to manipulate mass sentiments for votes.

Since retirement, he has been the flag-bearer of the human rights' movement in this country, giving life to the notion of a people's inquiry, carrying on in the footsteps of his mentor, Justice VR Krishna Iyer.